TRANSCRIPT OF RECORD

SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1926

No. 263

MISSOURI PACIFIC RAILROAD COMPANY, PETITIONER,

vs.

BYRD J. BOONE.

ON WRIT OF CERTIORARI TO THE ST. LOUIS COURT OF APPEALS OF THE STATE OF MISSOURI.

PETITION FOR CERTIORARI FILED SEPTEMBER 13, 1926.

CERTIORARI GRANTED JANUARY 3, 1927.

(30,692)

SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1925

No. 203

MISSOURI PACIFIC RAILROAD COMPANY, PETITIONER,

vs.

BYRD J. BOONE

ON PETITION FOR A WRIT OF CERTIORARI TO THE ST. LOUIS COURT OF APPEALS OF THE STATE OF MISSOURI

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[fol. 1] [Caption—Omitted]

[fol. 2] **IN ST. LOUIS CIRCUIT COURT**

58019-B

Byrd J. Boone

vs.

Missouri Pacific Railroad Company

Verdict and Judgment—Tuesday, January 2nd, 1923

Now at this day this cause coming on for hearing, come the parties hereto by their respective attorneys, comes also a jury to-wit: Joy V. Allison, John Decker, Henry Fisher, Charles Fouquet, Karl J. Guhme, Albert C. Hoffmeister, Joseph E. Ketterer, Otto Koenig, Walter M. Loewenstein, Arthur Miller, Geo. H. Norman and Samuel S. Robinson; twelve good and lawful men, duly elected, tried and sworn, well and truly to try the issues herein joined and a true verdict render according to the law and the evidence.

Thereupon the trial of this cause progressed and being terminated the jurors aforesaid upon their oaths as aforesaid, say:

"We, the jury in the above cause, find in favor of the plaintiff, on the issues herein joined and assess plaintiff's damages at the sum of One thousand 00/100 Dollars with interest at the rate of 6% from Jan. 3, 1922 to date amounting to Sixty 00/100 Dollars, aggregating a total damage of One thousand sixty Dollars.

Otto G. Koenig, Foreman; Geo. H. Morman, J. V. Allison, J. E. Ketterer, A. C. Hoffmeister, John Decker, Walter M. Loewenstein, Chas. M. Fouquet, Samuel S. Robinson, Hen-y Fischer."

And the jury being polled, ten of the jurors as having signed and returned said verdict say they concur therein, but the remaining two jurors, Karl J. Guhme and Arthur Miller, say they do not concur in said verdict.

Wherefore, it is considered and adjudged by the Court that the plaintiff have and recover of the defendant the aggregate sum of One Thousand Sixty and No/100 ($1,060.00) Dollars, together with the costs of this suit and have therefor execution. Verdict and instructions filed.

[fol. 3] IN ST. LOUIS CIRCUIT COURT

[Title omitted]

PETITION FOR AND ORDER ALLOWING APPEAL—Filed Jan. 30, 1923

Now at this day comes the defendant by attorney and upon its motion and for good cause shown, the Court doth grant the defendant's ninety days additional time within which to file its bill of exceptions; thereupon defendant files and presents to the Court an affidavit for appeal, and also presents to the Court an appeal bond, conditioned according to law, in the penal sum of $2,200.00, with the United States Fidelity & Guaranty Company as surety, and prays an appeal to the St. Louis Court of Appeals, and the Court having seen and examined said affidavit and bond, doth order that said bond be approved and filed, which is done, and that an appeal be and is hereby allowed the defendant to the St. Louis Court of Appeals from the judgment or decision of the Court heretofore rendered herein.

IN ST. LOUIS CIRCUIT COURT

CLERK'S CERTIFICATE

I, John Schmoll, Clerk of the Circuit Court, City of St. Louis, within and for the City and State aforesaid, certify the above and foregoing to be a full, true and complete transcript of the record entry of the judgment in the above entitled cause, showing the term and day of the term, month and year upon which the same shall have been rendered together with the order granting the appeal in the above entitled cause, as fully as the same remain of record in my office.

In testimony whereof I have hereunto set my hand and affixed the seal of said Court, at office, in the City of St. Louis, this 2nd day of August, 1923.

John Schmoll, Clerk Circuit Court. (Seal.)

IN THE

ST. LOUIS COURT OF APPEALS.

MARCH TERM, 1924

BYRD J. BOONE,
Respondent,

vs.

MISSOURI PACIFIC RAILROAD COMPANY, a Corporation,
Appellant.

No. .....

Appeal from the Circuit Court, City of St. Louis, Missouri,
Honorable George E. Mix, Judge.

APPELLANT'S ABSTRACT OF THE RECORD.

THE PLEADINGS.

The original petition of respondent was filed in the office of the Clerk of the Circuit Court, City of St. Louis, Missouri, on the 11th day of September, 1922, and summons was duly issued and served upon appellant, returnable to the October, 1922, Term of said Circuit Court.

Thereafter, on the 27th day of November, 1922, respondent filed her second amended petition, which (omitting caption and signatures) is as follows, to wit:

SECOND AMENDED PETITION.

Plaintiff comes by her attorney, and by leave of Court files this her second amended petition, and for cause of action states that at all the times hereinafter mentioned defendant was and is a corporation, duly organized and incorporated under the laws of the State of Missouri, relating to the formation of railroad companies, and having its principal office and agents for the transaction of its usual and customary business in the City of St. Louis, State of Missouri; that at all of said times defendant owned and operated a line of railroad extending from the City of Jefferson City, in the State of Missouri, to the City of Sedalia, in the State of Missouri, and that defendant was and is a common carrier for hire of goods, passengers and baggage between said points, and that said railroad, owned and operated by defendant as aforesaid, runs into and through the City of St. Louis, Missouri.

Plaintiff further states that on, to wit, the 3rd day of January, 1922, she became and was a passenger for hire on the defendant's said railroad from Jefferson City, Missouri, to Sedalia, Missouri, and, as a passenger thereof, delivered to defendant, at Jefferson City, Missouri, in good and proper condition, her baggage, consisting of one trunk, containing wearing apparel and other articles of personal use and convenience; that in consideration of plaintiff becoming a passenger on said railroad, and paying the lawful and

customary fare, which said fare plaintiff duly paid to defendant, defendant agreed and promised, well and safely and without delay, to carry said baggage from Jefferson City, Missouri, to Sedalia, Missouri, as aforesaid, and at the latter place to deliver same to plaintiff in as good condition as when received by defendant.

Plaintiff further states that defendant, in violation of said agreement, and in total disregard of its duty as a common carrier, as aforesaid, failed and neglected to deliver said baggage at its destination to plaintiff, or to anyone for her, in as good condition as when received by it, but, in disregard of its duty as aforesaid, (wrongfully) delivered said trunk and its contents to one John H. Clark, and that as a result of said wrongful act as aforesaid, said trunk was not delivered to plaintiff for more than one month thereafter and in a broken and damaged condition and with the following articles of wearing apparel missing therefrom, to wit:

One sealskin coat, large gray opossum collar, lined with gray silk satin from collar to waistline, below waistline with green satin with silver flowers, bought two years before loss;

One black crepe dinner dress, heavily embroidered in pearls, blue and silver thread, two months old;

One gray crepe evening dress heavily embroidered in cut steel beads;

One pair black brocaded strap slippers, bought at French Bootery, New York;

One pair black suede slippers;

One black taffeta afternoon gown;

One brown tailored suit;

One Batik tea gown;
Four pairs satin bloomers;
Six silk combinations;
Two silk crepe nightgowns;
One pair pink silk pajamas;
Fourteen pairs silk stockings;
Six handkerchiefs;
Two pairs white gloves.

That said articles were and are of the reasonable value of $1,398.00, and that all of same have been wholly lost to plaintiff.

Wherefore, plaintiff prays judgment against defendant for the sum of one thousand three hundred and ninety-eight dollars ($1,398.00), with interest thereon at the rate of six per cent per annum, and for costs of this suit.

And afterwards, on the 19th day of December, 1922, appellant filed its amended answer to said second amended petition, which answer (omitting caption and signatures) is as follows, to wit:

AMENDED ANSWER TO SECOND AMENDED PETITION.

Comes now the defendant in the above-entitled cause, by leave of Court, and for its amended answer to the second amended petition of the plaintiff filed herein admits that on the 3rd day of January, 1922, plaintiff became and was a passenger upon defendant's railroad from Jefferson City, Mo., to Sedalia, Mo., and, as a passenger thereof, delivered to defendant at Jefferson City, Mo., her baggage, consisting of one trunk and

contents, and defendant denies each and every other allegation in said petition contained.

Further answering, defendant says that, prior to the 3rd day of January, 1922, by virtue of the provisions of certain acts of Congress known as the Interstate Commerce Act and the Federal Control Act, the Director General of Railroads had promulgated a general order laying down certain rules with reference to baggage tariffs, which was duly filed with the Interstate Commerce Commission at Washington, D. C., in accordance with the provisions of said acts, and by which said order, rules and tariffs it was provided that, unless a greater sum was declared by a passenger and charges paid for excess value, at the time of delivery to a carrier, the value of property belonging to or checked for such passenger should be deemed and agreed to be not in excess of one hundred dollars ($100.00) and, by said rules and tariffs, the liability of the carrier was limited, in the event of loss or damage to baggage, to one hundred dollars ($100.00) unless a greater value was declared by the passenger at the time of delivery to the carrier and certain charges paid for the value of said baggage in excess of one hundred dollars ($100.00), and defendant says that said rules and tariffs governed the transportation of baggage by defendant for passengers upon its line of railroad between points on its said line within the State of Missouri and from Jefferson City, Missouri, to Sedalia, Missouri, as well as from points in Missouri to points in other states of the United States, and defendant states that said rules and tariffs so promulgated and filed by the Director General of Railroads,

as aforesaid, remained and continued in full force and effect until February 29, 1920.

Defendant further says that, by an act of Congress in effect on March 1, 1920, and thereafter, commonly called and known as the Transportation Act, by Section 208(a) thereof, it was provided that all rates, fares and charges and all classifications, regulations and practices in any wise changing, affecting or determining any part, or the aggregate, of rates, fares or charges, or the value of the service rendered, which on February 29, 1920, were in effect on the lines of carriers subject to the Interstate Commerce Act, should continue in force and effect until thereafter changed by state or federal authority, respectively, or pursuant to authority of law, and defendant states that, at the time of the passage of said act, and prior and subsequent thereto, it was and now is a carrier subject to the Interstate Commerce Act, and defendant further states that said rules and tariffs governing the transportation of baggage, so promulgated and filed by the Director General of Railroads, which were in effect on February 29, 1920, were not after said 1st day of March, 1920, and prior to said 3rd day of January, 1922, changed by either state or federal authority or pursuant to authority of law, and defendant further states that said rules and tariffs were in full force and effect and binding upon both plaintiff and defendant on said 3rd day of January, 1922, and that the baggage of plaintiff was accepted for transportation by defendant subject to said rules and tariffs and all of the provisions thereof.

Defendant further says that, in accordance with the provisions of the laws of this state, the defendant was prohibited from engaging or participating in the transportation of passengers or property between points within this state until its schedule of rates, fares and charges had been first filed and published with the Public Service Commission of Missouri, and that defendant was further prohibited from charging, demanding, collecting or receiving a greater or less or different compensation for the transportation of passengers or property or for any service in connection therewith than the rates, fares and charges applicable to such transportation as specified in its schedules filed with said Public Service Commission and in effect at the time, and defendant states that, prior to said 3rd day of January, 1922, defendant had been authorized by said Public Service Commission of Missouri to file, and had filed, with said Commission its tariffs containing its rates, fares and charges for the transportation of passengers and property between points in this state, in and by which schedules it was provided that, unless a greater sum was declared by a passenger and charges paid for excess value at the time of delivery of baggage to the carrier, the value of the property belonging to or checked for a passenger should be deemed and agreed to be not in excess of one hundred dollars ($100.00), and in and by which schedules the liability of defendant for the transportation of baggage, in the event of loss or damage to same, was limited to one hundred dollars, unless, at the time of the delivery thereof to defendant, the passenger declared a higher value and paid charges for such value

in excess of said sum of one hundred dollars ($100.00), and defendant states that said rates, fares and charges so filed by it with said Public Service Commission of Missouri were in full force and effect on said 3rd day of January, 1922.

Defendant further states that plaintiff's baggage was accepted by defendant and defendant agreed to transport and undertook the transportation thereof subject to all tariff regulations, and that notice thereof was duly given to plaintiff at the time of the acceptance by defendant of said baggage for transportation.

And defendant further states that, at the time of the delivery of said baggage by the plaintiff to it, plaintiff neither declared any greater sum or value of said baggage than one hundred dollars ($100.00) nor paid, nor offered to pay, charges for the value of said property, if any, in excess of one hundred dollars ($100.00); for which reason, if entitled to recover at all herein, plaintiff is not entitled to recover any greater sum than one hundred dollars ($100.00).

Further answering, defendant states that, upon delivery of said baggage to defendant, plaintiff did not state, or offer to state, the value of said baggage in excess of one hundred and fifty dollars ($150.00) and did not obtain a written receipt stating the value of said baggage and did not pay, or offer to pay, a reasonable charge for the assumption by defendant of liability in excess of one hundred and fifty dollars ($150.00), as provided by the laws of this state.

Wherefore, having fully answered said amended

petition, defendant prays to be dismissed with its costs.

And thereafter, on the 20th day of December, 1922, respondent filed her reply to said amended answer of appellant, which reply (omitting caption and signatures) is as follows:

REPLY.

Now comes plaintiff, by her attorney, and for her reply to the amended answer of the defendant heretofore filed herein, denies each and every allegation therein made or contained, and again prays for judgment as prayed for in her second amended petition.

TRIAL OF CAUSE.

Said cause came on for trial in the Circuit Court, City of St. Louis, Missouri, on the 2nd day of January, 1923, which was one of the days of the December, 1922, Term of the Circuit Court, City of St. Louis, Missouri, and on said date said cause was assigned to, and tried in, Division No. 9 of said court, before the Honorable George E. Mix, judge presiding in said division of said Circuit Court, and a jury, and on said 2nd day of January, 1923, the trial of said cause resulted in a verdict and judgment in favor of respondent and against appellant in the sum of one thousand sixty dollars ($1,060.00) and costs.

MOTIONS FOR NEW TRIAL AND IN ARREST OF JUDGMENT FILED.

Thereafter, on the 5th day of January, 1923, which was one of the days of the December, 1922, Term of

the Circuit Court, City of St. Louis, Missouri, and within four days after the rendition of said verdict and of the entry of judgment thereon, appellant filed its motion for a new trial in said cause, and on said 5th day of January, 1923, appellant also filed its motion in arrest of judgment.

MOTIONS FOR NEW TRIAL AND IN ARREST OF JUDGMENT OVERRULED.

Thereafter, on the 15th day of January, 1923, which was one of the days of the December, 1922, Term of the Circuit Court, City of St. Louis, Missouri, appellant's motion for a new trial was by the Court, by order duly entered of record, overruled; and on said 15th day of January, 1923, appellant's motion in arrest of judgment was by the Court, by order duly entered of record, overruled.

APPEAL ALLOWED.

Thereafter, on the 30th day of January, 1923, which was one of the days of the December, 1922, Term of the Circuit Court, City of St. Louis, Missouri, and during the same term of court at which appellant's motions for new trial and in arrest of judgment were overruled, appellant was, by the Court, by order duly entered of record, allowed ninety days from and after said 30th day of January, 1923, within which to file its bill of exceptions herein, and on said 30th day of January, 1923, and during the same term of said Circuit Court at which appellant's said motions for a new trial and in arrest of judgment were overruled, appellant filed its affidavit for an appeal and prayed an appeal to the St. Louis Court of Appeals, and was by the Court, by order duly entered of record, granted an ap-

peal to said St. Louis Court of Appeals; and on said day appellant filed its appeal bond in the sum of two thousand two hundred dollars ($2,200.00), with sufficient surety; which said bond was on said date by the Court duly approved.

Thereafter, on the 3rd day of August, 1923, and within the time theretofore allowed by the Court, and provided by law, appellant presented to said Court and to the Judge presiding in said division of said court its bill of exceptions herein, which said bill of exceptions was by the Court, by order duly entered of record, allowed, approved and signed by the Honorable George E. Mix, Judge of Division No. 9 of the Circuit Court, City of St. Louis, Missouri, before whom said cause was tried, and presiding in said division of said court on said 3rd day of August, 1923, and on said date said bill of exceptions was sealed, ordered filed, filed and made a part of the record herein, all by order of Court duly entered of record on said 3rd day of August, 1923.

Said bill of exceptions is as follows, and, where possible, in accordance with the rules of this Court, is set out in the abstract:

BILL OF EXCEPTIONS.

In the Circuit Court of the City of St. Louis,
State of Missouri.

Byrd J. Boone,
Plaintiff,
vs.
Missouri Pacific Railroad Company, a corporation,
Defendant.
No. 58,019.
Div. No. 9.

Be It Remembered, That on Tuesday, January 2, 1923, the above-entitled cause came on for a hearing before the Honorable George E. Mix and a jury in Division No. 9 of the Circuit Court of the City of St. Louis, State of Missouri, the plaintiff being represented by Judge Thomas Bond, the defendant being represented by M. U. Hayden, Esq., at which time the following proceedings were had, to wit:

Plaintiff, to sustain the issues to be by her sustained, offered and introduced the following evidence:

PLAINTIFF'S EVIDENCE.

Judge Bond: Gentlemen of the jury, as I indicated to you in my opening statement, there are a great many of the facts in this case which are not disputed. I think that the defendant will finally stand more on a question of law than one of fact, and so, in order to shorten the trial and to avoid the necessity of hearing detailed proof as to the checking and nondelivery

of the trunk and so forth, and to which there is no dispute, the parties have entered into a stipulation that has been signed by the attorneys for both sides, that these facts which I am now about to read to you may be taken as admitted and as true, and as established facts in the case, and about which evidence need not be introduced further than the reading of this stipulation. I offer in evidence the stipulation, your Honor.

The Court: It may be read.

Judge Bond: Stipulation filed December 20, 1922.

STIPULATION.

In order to dispense with proof as to matters concerning which there is no dispute, it is hereby stipulated and agreed by and between the parties hereto, by their respective attorneys, that the following facts are admitted to be true and that it shall not be necessary for either party to offer evidence at the trial in respect thereto, to wit:

That the trunk referred to in plaintiff's second amended petition was on, to wit, January 3, 1922, delivered to defendant's agent at Jefferson City, Missouri, and was by him checked for transportation over defendant's railroad to Sedalia, Missouri; that said trunk reached Sedalia, Missouri, and was received by defendant's agent at Sedalia, Missouri, on the evening of January 3, 1922; that, shortly after the arrival of said trunk at Sedalia, Missouri, while said trunk was in defendant's baggage room in its station at Sedalia, Missouri, one John H. Clark removed the check which had been attached to said trunk at Jefferson City, Missouri, and substituted and

attached to said trunk another check in lieu thereof, the duplicate of which latter check was in the possession of said John H. Clark and that, at some time during the night of January 3, 1922, or early morning of January 4, 1922, said trunk and contents were delivered by defendant's agent at Sedalia to a local drayman, acting as the agent of said John H. Clark, upon the presentation by said local drayman of the duplicate check above referred to, which duplicate check had theretofore been in the possession of the said John H. Clark, and that the said John H. Clark then caused said trunk to be shipped out of Sedalia by way of another railroad.

(Signed) Thomas Bond,
Attorney for Plaintiff.
(Signed) James F. Green,
M. U. Hayden,
Attorneys for Defendant.

The Court: You had better have that properly marked.

Judge Bond: I will have it marked as "Plaintiff's Exhibit A."

(Said stipulation was marked by the stenographer as "Plaintiff's Exhibit A.")

BYRD J. BOONE,

a witness of lawful age, being first duly sworn, testified as follows:

Direct Examination, by Judge Bond.

I live at 4546 Lindell boulevard. I am the plaintiff in this case. On or about Christmas of 1921 I had

occasion to make a visit to certain towns in Missouri. I left St. Louis on December 27th and went to Jefferson City. From Jefferson City I went to Sedalia, Mo., to visit relatives. I arrived at Jefferson City at noon of December 27th. I left Jefferson City for Sedalia on the evening of January 3rd at 5:25. I went from Jefferson City to Sedalia, Mo. I traveled over the Missouri Pacific. I bought my ticket at the Missouri Pacific station from the ticket agent at Jefferson City. I checked my trunk in the baggage room at the station. I received from the baggage agent a check covering the transportation of that trunk.

Q. I show you here a document purporting to be a check issued by the Missouri Pacific Railroad Company, covering the transportation of a trunk from Jefferson City to Sedalia, Missouri, via Missouri Pacific, and ask you if that is the check which you received. A. That is my check.

Judge Bond: I will ask that check be marked by the stenographer as "Plaintiff's Exhibit B."

(Said check was marked by the stenographer as "Plaintiff's Exhibit B.")

Prior to delivering this trunk to the defendant's agent for transportation, I packed it Monday. I was packing two days, starting on Monday.

Q. Well, I will ask you to look at the second amended petition in this case which you heard me read to the jury and look at pages 2 and 3, in which the articles claimed to have been lost are listed, and ask you to read those over and state whether or not you recollect all of those articles being present in the trunk when you packed same prior to delivering it to the defendant at Jefferson City. A. I recollect them all.

Q. You recollect placing each of those articles in the trunk? A. I do.

Q. Now, what time did you get to Sedalia? A. About 7 o'clock in the evening.

Q. Now, on the next day, did you make inquiry about your trunk? A. I did.

Q. Was it delivered to you by the defendant? A. They informed me it hadn't arrived at Sedalia.

Q. Did you make any further inquiry? A. The next morning we did, and they informed us that my trunk had been stolen.

Q. Did they ever deliver you your trunk while you were at Sedalia? A. They did not. The day I left Sedalia, on the last day of my visit—four weeks.

Q. Now, then, did you know anybody by the name of John H. Clark? A. I did not.

Q. Did you ever authorize anybody to deliver your trunk to John H. Clark? A. I did not.

Q. Did you have any knowledge of the fact that it had been delivered to John H. Clark prior to the time that you were so informed by the railroad agent? A. I did not.

Q. This check which I have shown you covering transportation of your trunk and which has been marked as "Plaintiff's Exhibit B," did you ever surrender that to Clark or anybody for him? A. I did not.

Q. Now, then, when did you say you saw your trunk, Mrs. Boone? A. One month, four weeks.

Q. When and where was it; when and where, if ever, was it delivered to you? A. They had it at the station, the Missouri Pacific station; as I started to leave, my trunk arrived the same day.

I left Sedalia the last part of January. On the day I was leaving I saw my trunk there at the station. They had recovered the trunk. It was redelivered to me in St. Louis, perhaps the 1st or 2nd of February.

Q. State whether or not those articles listed on pages 2 and 3 of the petition, the second amended petition, which I have just shown you here, were they in the trunk when it was redelivered to you? A. They were not. They were all gone.

I am absolutely positive they were all in the trunk when I delivered it to the railroad at Jefferson City.

(Then follows a description by the plaintiff of the articles in the trunk, together with her opinion as to the respective values of the different articles listed.)

Cross-Examination, by Mr. Hayden.

I left Jefferson City at 5:25 on the evening of January 3rd. I purchased my ticket myself. I attended to the checking of the trunk myself.

Q. Did you have any conversation at the time the trunk was checked with the man who checked it, in reference to the value of the trunk or the contents? A. I did not.

Q. And you didn't declare? A. Declared no value.

Q. On the trunk or contents? A. No, it was a very short trip.

Q. I say, you didn't declare any value on the trunk or contents at that time? A. No, I did not.

Redirect Examination, by Judge Bond.

Q. At the time you purchased that ticket, did the agent say anything to you about indicating any declared value? A. He did not.

Q. Did he mention any tariff or any tariff provisions? A. He did not.

Q. Did he give you any choice of rates based on value? A. No, I heard nothing of that kind; I only got my check.

Q. He only told you the fare was so much and you paid that? A. Yes, sir.

Q. And the baggageman, when you checked it, did he say anything to you about tariff provisions or a choice of rates? A. He did not; I heard nothing of it.

Q. Did he say anything to you about rates or fares at all? A. He did not.

Q. Did he request you to make any declaration of value? A. He did not.

Mr. Hayden (Q.): You didn't make any declaration of value? A. No.

Judge Bond (Q.): Did you at the time know anything about any tariff publications or their contents? A. I did not.

(Here follows an admission of counsel for appellant that the Missouri Pacific Railroad at all the times mentioned in this evidence operated a railroad between Jefferson City and Sedalia, Missouri; that both stations are within the State of Missouri, and that the transportation from one to the other was transportation only within the State of Missouri.)

Plaintiff rests.

Thereupon, defendant offered and asked the Court to give and read to the jury the following instruction in the nature of a demurrer to the plaintiff's evidence:

DEMURRER TO THE EVIDENCE.

"The Court instructs the jury that under the pleadings and the evidence of the plaintiff the plaintiff is not entitled to recover and your verdict will be for the defendant."

Which said instruction the Court refused to give; to which action and ruling of the court in refusing to give said instruction in the nature of a demurrer to the plaintiff's evidence defendant then and there duly excepted and still continues to except.

Thereupon the defendant, to sustain the issues to be by it sustained, offered and introduced the following evidence:

DEFENDANT'S EVIDENCE.

Mr. Hayden: If the Court please, I offer Baggage Tariff No. 25-2, purporting to have been filed with the Interstate Commerce Commission by the Director General of Railroads, effective October 1st, 1919, and more particularly rule 10, found on page 15 thereof, paragraph A, which reads as follows:

Judge Bond: If your Honor please, before he reads those tariff provisions in evidence, I want to make an objection to their introduction, first, for the reason that this tariff is a tariff purporting to be in effect—made effective by the Director General, through his agents, October 1st, 1919, and there is no showing here that it, by any manner of publication or in any way, was filed or in effect in Missouri at the time of the loss of this trunk in 1922. However, I make the further objection

that even though it could be connected up and shown to have been filed, or in some way have further application, that the rules therein contained undertake to limit the carriers' liability to $100.00 in the case of loss or damage, and that has no application to the facts of the case that have been developed so far; for the reason that these tariff provisions and contracts in limitations of liability apply only when they agree upon special value or when they ship their freight under reduced rate valuations, that those limitations shall avail the carrier in the event of some mischance or accident or loss in transit, but are no defense when the loss occurs through the carrier's affirmative, wrongful act or conversion of the property.

The Court: Under the decisions and in view of this stipulation, I don't see what place these rates have here at all. I don't think they have any place in the record before the jury, but you may offer them and then you can make your objection and we will save time all around.

To which ruling of the Court defendant, by its counsel, then and there duly excepted and still excepts.

Mr. Hayden: First, I offer in evidence this Baggage Tariff No. 25-2, rule 10 thereof, page 15, reading as follows: "Paragraph A"——

The Court: Is that the one you just offered?

Mr. Hayden (reading): "Subject to limitations shown in rule 9, one hundred and fifty (150) pounds of baggage, not exceeding one hundred dollars ($100.00) in value, may be checked without additional charge for each adult passenger, and seventy-five (75)

pounds, not exceeding fifty ($50.00) dollars in value, for each child traveling on a half ticket."

Mr. Hayden: I will read from page 16, "rule 11, paragraph D": "Unless a greater sum is declared by a passenger and charges paid for excess value (see note) at time of delivery to carrier, the value of property belonging to, or checked for a passenger, shall be deemed and agreed to be not in excess of the amounts specified in rules 5, 6 and 10, and the carriers issuing and participating in this tariff will not accept claim for a greater sum in case of loss or damage.

"If passenger declares according to the form prescribed by checking carrier, a greater value than specified in the rules mentioned in the preceding paragraph, there will be an **additional charge** at the rate of ten (10) cents for each one hundred dollars ($100.00) or fraction thereof, above such agreed maximum value. **Minimum** charge ten (10) cents."

Mr. Hayden: Rule 5 referred to there, pertains to articles other than baggage which may be handled in regular baggage service. Rule 6 pertains to public entertainment paraphernalia, and rule 9 pertains to baggage or property prohibited because of weight, size, shake, value or character.

Judge Bond: That offer is objected to for the reason above stated and also for the reason that there is no showing that the rates therein contained were in effect on intrastate movements in Missouri at the time the trunk in question was lost and for the further reason that the tariffs so offered and extracts therefrom are incompetent and irrelevant and immaterial, and do not tend to prove or disprove any issues in the case.

The Court: Objection sustained.

To which ruling of the Court defendant, by its counsel, then and there duly excepted and still excepts.

Mr. Hayden: I now offer in evidence supplement No. 2, baggage tariff No. 25-2, effective February 29, 1920, and filed with the Interstate Commerce Commission and published by the Director General of Railroads, and refer more particularly to rule 11 on page 5 thereof, which provides as follows:

"Paragraph D: Unless a greater sum is declared by a passenger (see exception) and charges paid for excess value at time of delivery to carrier, the value of property belonging to, or checked for a passenger, shall be deemed and agreed to be not in excess of the amounts specified in rules 5, 6 and 10 of tariff and this supplement, and the carriers issuing and participating in this tariff will not accept claim for a greater sum in case of loss or damage."

Mr. Hayden: The exception referred to there reads as follows: "Holders of free railroad or steamship passes assume all risk of damage to, or loss of property, therefore they will not be accorded the privilege of declaring excess value on baggage checked on such transportation. If passenger declares, according to the form prescribed by checking carrier, a greater value than specified in the rules mentioned in the preceding paragraph, there will be an **additional charge** at the rate of ten (10) cents for each one hundred dollars ($100.00) or fraction thereof, above such agreed maximum value. **Minimum** charge ten (10) cents."

Mr. Hayden: Now, rules 5, 6 and 10 referred to therein are the same as rules 5, 6 and 10 already offered.

Judge Bond: I object to that for the reasons above stated and also for the reason that said tariffs of the Director General and the extracts therefrom had no lawful application on intrastate movements in Missouri at the time of the transportation in question, and for the further reason that the tariff rules herein offered had no application to the circumstances under which the loss complained of in this case was sustained, and for the further reason that the tariffs and extracts therefrom so offered are incompetent, irrelevant and immaterial and do not tend to prove or disprove any issue in the case.

The Court: The objection to that last tender will be sustained.

Mr. Hayden: I want the record to show an exception to each of those rulings there.

The Court: Yes.

To which ruling of the Court defendant, by its counsel, then and there duly excepted and still excepts.

Mr. Hayden: I now offer the decision and order of the Public Service Commission of Missouri in case No. 2492, and entitled, "In the matter of the application common carriers in State of Missouri for authority to put in effect increases in freight and passenger charges similar to those authorized by the Interstate Commerce Commission," found in Volume 9 of the Public Service Commission Reports of Missouri, at pages 685 to 692, inclusive, and the order beginning on page 692, reading as follows:——

Judge Bond: Well, now, if your Honor please, before reading that order I want to object to this volume and to this decision of the Public Service Commission of Missouri, for the same reasons as above stated, and particularly on the ground it is incompetent and irrelevant and immaterial and doesn't tend to prove or disprove any issue in the case, and then I make the further objection to your Honor that this decision is a public document printed under authority of law, being the public reports of the Public Service Commission of the state, and wherever anything therein is competent in a lawsuit the Court takes judicial notice thereof, just as it does to its Supreme and Appellate Courts, and so, under those circumstances, it is necessary to encumber this proceeding with fifty or sixty printed pages of that decision, because wherever they are competent the Court takes judicial notice of them.

Mr. Hayden: I don't understand the law to be that.

Judge Bond: At any rate, that is no more competent than the tariffs and I make the same objection to that decision that I did to the tariffs.

The Court: Sustained.

To which ruling of the Court defendant, by its counsel, then and there duly excepted and still excepts.

Said decision is in words and figures as follows:

DECISION OF THE PUBLIC SERVICE COMMISSION.

1. Rates. Railroads. Schedules. Filing. Permission is granted for the filing of railroad tariffs containing rates promulgated by the Director General of

Railroads for roads subject to federal control, upon their relinquishment from such control, upon condition that the reasonableness of any rate therein increased by the Director General more than 25 per cent be subject to future investigation.

2. Discrimination. Rates. Railroads. State and interstate. Under the Federal Transportation Act of February, 1920, undue discrimination between intrastate and interstate commerce is prohibited, authority being vested in the Interstate Commerce Commission to equalize the rates under such conditions.

3. Rates. Railroads. Freight. Passenger. Pullman equalization with interstate. Increased intrastate railroad rates of 20 per cent on passenger, excess baggage, milk and cream, 50 per cent on sleeping and parlor cars and 35 per cent on freight, except on certain commodities wherein its application will result in an increase in excess of 70 per cent of the rate in effect June 24, 1918, are approved to equalize state rates with increased rates authorized by the Interstate Commerce Commission under the Federal Transportation Act of February, 1920.

Cyrus Crane,

For the Carriers.

J. F. Green and W. A. Rambach,

For Missouri Pacific Ry. Co.

* * * * * * *

REPORT OF THE COMMISSION.

By the Commission: This cause is before the Commission upon application of the carriers operating within the State of Missouri for authority to place in effect on Missouri State traffic increases authorized by the Director General in General Order No. 28 and increases similar to those granted by the Interstate Commerce Commission in case styled "Increased Rates 1920, 58 I. C. C. 220."

On January 1, 1918, the President of the United States, acting through the Director General of Railroads, assumed control of the principal railway lines in the United States. In June, 1918, the Director General issued his General Order No. 28, providing a uniform passenger fare throughout the United States of 3 cents per mile, effective June 10, 1918, and an increase in freight rates, commonly called the "25 per cent increase," effective June 25, 1918. So far as freight rates were concerned, this order prescribed a minimum scale of class rates starting at 25 cents per 100 pounds for first-class traffic, with a further provision for a minimum charge of 50 cents on any one shipment. A further minimum of $15.00 per car was made as the charge of road-haul movement, except upon a few very low-grade commodities. All freight rates, both state and interstate, were 25 per cent, with specific advances upon many commodities and with maximum advances on a few commodities. From time to time during the period of federal control the Director General ordered other advances in specific rates, either upon the mileage scales or as applying between points.

The Act of Congress passed in February, 1920, and known as the Transportation Act, provides in section 208 (a):

> "All rates, fares and charges and all classifications, regulations and practices in anywise changing, affecting or determining any part or the aggregate of rates, fares, or charges, or the value of the service rendered, which on February 29, 1920, are in effect on the lines of carriers subject to the Interstate Commerce Act, shall continue in force and effect until thereafter changed by state or federal authority, respectively, or pursuant to authority of law; but prior to September 1, 1920, no such rate, fare or charge shall be reduced, and no such classification, regulation or practice shall be changed in such manner as to reduce any such rate, fare, or charge, unless such reduction or change is approved by the Commission."

(1) The Director General, in the early part of his administration, ordefed that tariffs applicable upon state traffic in the various states should be filed with state commissions for their information only, and that such tariffs should not be issued in compliance with the rules of such commissions, and should contain no number designating them as state commission's tariffs. During the latter part of federal control, and just prior to the return of the railroads to their private owners, the Director General ordered all tariffs filed with state commissions under such state commission's numbers. These tariffs were offered to this Commission, but not being compiled in accordance with the rules of this Commission and

not providing for the cancellation of tariffs lawfully on file, this Commission ordered the rejection thereof.

During the period of federal control the carriers were guaranteed certain returns for the use of their property by the Government, and the Transportation Act of 1920 provided for the return of such property to the carriers on March 1, 1920, with a continuation of the guarantee for six months thereafter, to and including August 31, 1920. It further required the Interstate Commerce Commission (section 15[a]) to initiate, establish or adjust the rates so that the carriers as a whole or the carriers in particular groups should earn 5½ or 6 per cent of the aggregate value of their property for a period of two years, beginning March 1, 1920. In furtherance of this provision the Interstate Commerce Commission conducted extensive hearings and divided the railroads into groups and subgroups and established the percentage increase of freight and passenger rates necessary in the various groups to provide the return above referred to. The Western group may be roughly described as that portion of the United States lying west of the Mississippi River and east of the Pacific Coast States, comprising, among other states, the State of Missouri, and in this territory the interstate Commerce Commission found that the following percentage increase of effective rates and fares was necessary to produce the fixed return: Freight rates, 35 per cent; passenger fares, excess baggage charges and milk and cream shipments, 20 per cent; surtax for the privilege of riding in Pullman cars, 50 per cent of the effective fare.

After due notice to all concerned, hearing was held before the full Commission at its office in Jefferson City, Missouri, on the 23rd of August, 1920. The carriers introduced before the Commission the complete record of testimony and exhibits presented to the Interstate Commerce Commission in the case above referred to, together with the report and order of the Interstate Commerce Commission therein, and asked for an order authorizing the filing with this Commission of the tariffs containing the rates of the Director General as in effect on February 29, 1920, and to increase such rates and fares by the percentages authorized by the Interstate Commerce Commission as above referred to.

Protestants appeared representing brick shippers, coal producers and traveling men.

* * * * * * *

The Transportation Act specifically provides that the rates promulgated by the Director General, as in effect February 29, 1920, shall continue in effect until changed by lawful authority. The record before this Commission at this time is not sufficient to justify any proceedings requiring a reduction of these rates, therefore the application of the applicants for authority to lawfully file the tariffs containing the Director General's rates as in effect on February 29, 1920, will be approved, but the Commission will retain jurisdiction of the subject matter of these rates, so that any rate which by the Director General was increased more than 25 per cent may be investigated upon complaint from any interested party or upon the Commission's own initiative.

* * * * * * *

As originally filed with the Interstate Commerce Commission the application of the carriers sought increases only upon freight traffic, but with the award of the Labor Board to be met, additional increases were found necessary and the Interstate Commerce Commission was asked to distribute this portion of the increase over freight, passenger, excess baggage and Pullman passengers, and the opinion of the Interstate Commerce Commission granted the latter request.

* * * * * * *

(2) The Transportation Act clearly prohibits undue discrimination between intrastate and interstate commerce and authorizes the Interstate Commerce Commission, after due hearing, to specify the one rate for the two classes of traffic where such undue or unjust discrimination is shown.

The proceedings before this Commission must be treated in the nature of emergency proceedings and this Commission must act upon the evidence before it. The record before the Commission is in a measure incomplete and the continuation of the rates hereby sought should be conditioned upon the presentation by the applicants of more accurate data in the future.

The evidence before this Commission is sufficient to justify an emergency order.

* * * * * * *

From all the evidence available this Commission is of the opinion that the advances authorized by the Interstate Commerce Commission for application in the Western group should be authorized upon Missouri

state traffic to such an extent as will place the state and interstate rates upon a general parity.

* * * * * * *

Mr. Hayden: I also offer the order which follows the decisions in that case referred to, beginning at the bottom of page 692 of Volume 9 of the Public Service Commission Reports of Missouri, and ending on page 696 of that volume.

Judge Bond: I make the same objection.

The Court: Sustained.

To which ruling of the Court defendant, by its counsel, then and there duly excepted and still excepts.

Said order is in the words and figures as follows, to wit:

ORDER.

* * * * * * *

Ordered: 1. That the applicants herein be and they are hereby authorized to file with this Commission prior to September 1, 1920, tariffs containing rates promulgated by the Director General of Railroads between June 10, 1918, and February 29, 1920, as effective at midnight of February 29, 1920.

* * * * * * *

Ordered: 3. There shall be filed with said tariffs as above authorized all current supplements that were in effect at midnight of February 29, 1920, and such supplements shall carry numbers showing that they are supplements to the current tariffs filed under the provisions of Section 2 of this order.

* * * * * * *

Ordered: 5. That the applicants herein be and they are hereby authorized to file with this Commission on one day's notice, effective not prior to September 1, 1920, tariffs or supplements to tariffs containing the following increases:

* * * * * * *

Ordered: 11. That the increases herein authorized shall be effective for a period of six months from and after September 1, 1920, at which time said rates shall be restored to the basis of rates in effect on February 29, 1920, unless the Commission shall extend the period of effectiveness or change the rates herein prescribed.

* * * * * * *

Ordered: 17. The term "applicants" as used herein shall be construed as referring to the following-named carriers:

* * * * * * *

Missouri Pacific Railroad Company.

* * * * * * *

Mr. Hayden: I want to state to the Court that this order contains, in effect, the rates that were filed by the Director General, effective February 29, 1920.

Judge Bond: That is your conclusion.

The Court: His contention.

Mr. Hayden: Yes.

Judge Bond: That is not founded on the order.

Mr. Hayden: Yes, it is the order that was promulgated by the Director General, and I am offering the whole order.

The Court: The objection will be sustained.

To which ruling of the Court defendant, by its counsel, then and there duly excepted and still excepts.

Mr. Hayden: You didn't offer the baggage check. Do you want to offer that?

Judge Bond: I have not objection to you offering it if you want to.

Mr. Hayden: I now offer in evidence Plaintiff's Exhibit B, being the check delivered to the plaintiff when the trunk mentioned in this case was checked for transportation from Jefferson City to Sedalia.

Judge Bond: You are offering the whole check?

Mr. Hayden: Yes, I am offering the whole check. I think it had better be read into the record. It reads as follows: "Missouri Pacific Railroad Company, transported subject to tariff regulations, W. H. Bissland, Gen'l Ag't, St. Louis, Mo., passenger's duplicate, from Jefferson City, Mo., to Sedalia, Mo., routed via Mo. Pac. R. R." At the bottom of it "Mo. Pac. R. R. Co. S-567-000."

Mr. Hayden: I offer in evidence Western Passenger Bureau Missouri Supplement No. 6, canceling baggage tariff No. 25-2, effective March 1st, 1922, and filed with the Public Service Commission of Missouri.

Judge Bond: By whom?

Mr. Hayden: By the defendant.

Judge Bond: I object to that for the reasons above stated, and which were recited when the other tariffs were offered, and for the further reason that this tariff appears on its face to have been issued and purporting to be effective after the loss of the trunk referred to in the evidence in this case, and any rates

named in that tariff could, under no circumstances, have any application to this company.

Mr. Hayden: I don't offer the tariff, but only offer it to show that the one heretofore offered limiting value was canceled on March 1st, 1922.

Judge Bond: I object to it.

Mr. Hayden: I am not offering the tariff, but only the cover with that declaration that it cancels the 25-2.

Judge Bond: I object to that as being incompetent and irrelevant and immaterial for that purpose.

The Court: Sustained.

To which ruling of the Court defendant, by its counsel, then and there duly excepted and excepts.

Defendant rests.

Plaintiff rests.

This was all the evidence offered and introduced in the case.

Thereupon the defendant offered and asked the Court to give and read to the jury the following instruction in the nature of a demurrer, at the close of the entire case; which said instruction is as follows:

DEMURRER TO THE EVIDENCE.

"The Court instructs the jury that, under the pleadings and the law and all the evidence in this case, the plaintiff is not entitled to recover and your verdict will be for the defendant."

Which said instruction the Court refused to give; to which action and ruling of the Court in refusing to give said instruction defendant, by its counsel, then and there duly excepted and still continues to except.

INSTRUCTIONS.

PLAINTIFF'S INSTRUCTIONS GIVEN.

At the instance and request of plaintiff, the Court gave and read to the jury the following instructions, numbered 1 and 2:

Instruction No. 1.

The Court instructs the jury that if you find and believe from the evidence that at the time plaintiff delivered the trunk referred to in the evidence to defendant at Jefferson City, Missouri, for transportation to Sedalia, Missouri, that said trunk contained the articles of wearing apparel referred to in the evidence, and if you further find that upon the arrival of the said trunk at Sedalia it was delivered by defendant to one John H. Clark, without the knowledge or consent of plaintiff, and that said trunk was thereafter recovered by defendant and delivered to plaintiff in St. Louis on or about February 1, 1922, and that the articles of wearing apparel referred to in the evidence, or all or any of them, were missing therefrom, then you are instructed that plaintiff is entitled to recover and your verdict must be for the plaintiff.

Instruction No. 2.

The Court instructs the jury that if you find for the plaintiff you will award her as damages such sum, if any, as you believe from the evidence to be the fair and reasonable value, if any, of the articles of wearing apparel, if any, missing from plaintiff's trunk when said trunk was returned to her. The sum awarded plaintiff, if any, however, not to exceed the sum of $1,398.00. You are further instructed that you may also allow plaintiff interest on the damages awarded her, if any, at the rate of six per cent (6%) per annum from the 4th day of January, 1922, until this date.

DEFENDANT'S INSTRUCTION REFUSED.

Defendant presented to the Court, in writing, and requested the Court to give and read to the jury the following instruction, marked "A".

A.

The Court instructs the jury that, under the law in this case, the plaintiff is not entitled to recover any greater sum than one hundred dollars ($100.00). Therefore, if you find and believe from the evidence that the plaintiff is entitled to recover, you will return a verdict in her favor and against the defendant for the sum of one hundred dollars ($100.00).

Which instruction the Court refused to give and read to the jury.

Mr. Hayden: Let the record show that the defendant excepts to the giving and reading of the instructions given by the Court at the instance of the plaintiff, and excepts to the refusal of the Court to give the instruction asked by the defendant.

Judge Bond: I want to say this, that Mr. Hayden has noted an exception to the giving of the instructions numbered 1 and 2, given on behalf of the plaintiff, and I ask him now to indicate specifically, to state in respect to which he claims that one or either or both of those instructions are erroneous, in order that I may have an opportunity, if there is any error, to voluntarily correct it at this time.

VERDICT.

Under the instructions of the Court, on the second day of January, 1923, at the December Term, 1922, of said court, the jury returned into court the following verdict:

In the Circuit Court, City of St. Louis.

Division No. 9.

Byrd J. Boone,
Plaintiff,
vs.
Missouri Pacific R. R. Co.,
Defendant.
No. 58,019.

We, the jury in the above cause, find in favor of the plaintiff on the issues herein joined, and assess plaintiff's damages at the sum of one thousand 00/100 dollars, with interest at the rate of 6 per cent from

January 3, 1922, to date, amounting to sixty 00/100 dollars, aggregating a total damage of one thousand and sixty dollars.

(Signed) Otto G. Koenig, Foreman,
Geo. H. Noonan,
J. V. Allison,
J. E. Kitteru,
A. C. Hoffmeister,
John Decker,
Walter M. Lowenstein,
Chas. M. Fouqueb,
Samuel S. Robinson,
Henry Fisher.

DEFENDANT'S MOTION FOR NEW TRIAL.

On the fifth day of January, 1923, during the same term of said court, and within four days after the trial of said cause and the rendition of said verdict, defendant filed its motion for a new trial, which is, in words and figures, as follows:

State of Missouri, } ss.
City of St. Louis. }

In the Circuit Court, City of St. Louis, Missouri.

Division No. 1.

December Term, 1922.

Byrd J. Boone, Plaintiff,
vs.
Missouri Pacific Railroad Company, a corporation, Defendant.
No. 58,019.

DEFENDANT'S MOTION FOR NEW TRIAL.

Now on this 5th day of January, 1923, during the December, 1922, Term of the Circuit Court, City of St. Louis, Missouri, and within four days after the rendition of the verdict of the jury in the above-entitled cause and of the entry of judgment thereon, comes the defendant in said cause and moves the Court to set aside said verdict and judgment and to

grant it a new trial of the issues herein joined for the following reasons:

I.

Because the verdict is against the law.

II.

Because the verdict is against the evidence.

III.

Because the verdict is against the weight of the evidence.

IV.

Because the Court erred in excluding, upon objection of plaintiff, competent, relevant and material testimony offered by defendant.

V.

Because the Court erred in admitting, over the objection of defendant, incompetent, immaterial and irrelevant testimony offered by plaintiff.

VI.

Because the Court erred in excluding, upon objection of plaintiff, the tariffs and rules therein contained and decision and order of the Public Service Commission of Missouri offered by defendant.

VII.

Because the Court erred in sustaining plaintiff's objection to the offer of proof of the tariffs and rules

therein contained and decision and order of the Public Service Commission of Missouri.

VIII.

Because the Court erred in refusing the instruction in the nature of a demurrer to the evidence offered and requested by defendant at the close of plaintiff's evidence and in not, at that time, instructing the jury to return a verdict in favor of defendant.

IX.

Because the Court erred in refusing the instruction in the nature of a demurrer to the evidence offered and requested by defendant at the close of all the evidence and in not, at that time, instructing the jury to return a verdict in favor of defendant.

X.

Because the Court erred in giving and reading to the jury instruction No. 1 at the instance of plaintiff.

XI.

Because the Court erred in giving and reading to the jury instruction No. 20 at the instance of plaintiff.

XII.

Because the verdict is for the wrong party.

XIII.

Because, upon the whole record, the verdict and judgment should be in favor of defendant.

XIV.

Because the Court erred in refusing to give and read to the jury instructions marked "A" and "B" requested by defendant.

XV.

Because the verdict and judgment in this case, in excess of $100.00, are void and of no effect for the reason that, to permit a recovery in this case, would be to deprive defendant of its rights under its contract of carriage with plaintiff and would impair the obligation of such contract in violation of Section 15 of Article II of the Constitution of Missouri.

XVI.

Because the verdict and judgment in excess of $100.00 are void and of no effect for the reason that to permit a recovery in this case would be to deprive defendant of its property without due process of law in violation of Section 30 of Article II of the Constitution of Missouri.

XVII.

Because the verdict and judgment in this case in excess of $100.00 are null and void and of no effect for the reason that to permit a recovery herein in excess of the sum of $100.00 would be to deprive the defendant of its property without due process of law and to deny it the equal protection of the laws in violation of Section 1 of Article XIV of the Constitution of the United States.

XVIII.

Because the verdict and judgment in this case are null and void and of no effect for the reason that to permit a recovery in this case in excess of $100.00 is to deprive defendant of its rights under its contract of carriage with plaintiff and impair the obligation of such contract in violation of Section 10 of Article I of the Constitution of the United States.

XIX.

Because the verdict is excessive.

XX.

Because the jury failed to follow and be guided by the law as declared in the instructions of the Court.

XXI.

Because, upon the whole record, the verdict and judgment should not be in favor of plaintiff for any greater amount than $100.00.

James F. Green,
M. U. Hayden,
Attorneys for Defendant.

On the 5th day of January, A. D. 1923, during the same term of said court, and within four days after the trial of said cause and the rendition of said verdict, defendant filed its motion in arrest of judgment, which is in words and figures as follows:

State of Missouri, } ss.
City of St. Louis. }

In the Circuit Court, City of St. Louis, Missouri.

Division No. 1.

December Term, 1922.

Byrd J. Boone, Plaintiff,
vs.
Missouri Pacific Railroad Company, a corporation, Defendant. } No. 58,019.

DEFENDANT'S MOTION IN ARREST OF JUDGMENT.

Now on this 5th day of January, 1923, during the December, 1922, Term of the Circuit Court, City of St. Louis, Missouri, and within four days after the rendition of the verdict of the jury in the above-entitled cause and of the entry of judgment thereon, comes the defendant in said cause and files this, its motion in arrest of judgment in this cause, for the following reasons:

I.

Because the petition does not contain facts sufficient to constitute a cause of action against defendant.

II.

Because the verdict and the judgment are outside the issues made by the pleadings and are not supported by the pleadings.

III.

Because upon the whole record the verdict and judgment should be for the defendant.

IV.

Because upon the whole record the plaintiff is not entitled to recover in excess of $100.00.

V.

Because no testimony was offered on which to sustain the verdict in this cause.

James F. Green,
M. U. Hayden,
Attorneys for Defendant.

And thereafter, on the 15th day of January, 1923, which was one of the days of the December, 1922, Term of the Circuit Court, City of St. Louis, Missouri, defendant's said motion in arrest of judgment was, by the Court, by order duly entered of record, overruled.

To which action of the Court in so overruling its said motion in arrest of judgment defendant then and there duly excepted and saved its exception and still excepts.

And afterwards, on the said 15th day of January, 1923, the same being one of the days of the December, 1922, Term of the Circuit Court, City of St. Louis, Missouri, defendant's said motion for a new trial was by the Court, by order duly entered of record, overruled.

To which action of the Court in so overruling its said motion for a new trial defendant then and there duly excepted and saved its exception and still excepts.

And thereafter, on the 30th day of January, 1923, which was one of the days of the December, 1922, Term of the Circuit Court, City of St. Louis, Missouri, and during the same term of court at which defendant's motions in arrest of judgment and for a new trial were overruled, defendant was by the Court, by order duly entered of record, allowed ninety days from and after said 30th day of January, 1923, within which to file its bill of exceptions herein, and on said 30th day of January, 1923, and during said December, 1922, Term of said Circuit Court, defendant filed its application and affidavit for an appeal in said cause and was on said 30th day of January, 1923, by the Court, by order duly entered of record, granted an appeal to the St. Louis Court of Appeals, and on said date defendant filed its appeal bond in the penal sum of $2,200.00, with the United States Fidelity and Guaranty Company, as surety; which said appeal bond was duly approved by the Court.

Inasmuch as the foregoing evidence, proceedings, matters, things, motions, rulings and exceptions do not appear of record and, in order that the same may be made a part of the record in this cause, so as to be presented to said St. Louis Court of Appeals, defendant here now presents to the Court this, its bill of exceptions, and prays that the same may be settled and allowed, approved, signed, sealed, filed and ordered

made a part of the record in this cause; all of which is accordingly done on this 3rd day of August, 1923.

George E. Mix,
Judge of the Circuit Court, City of St. Louis, Missouri, Division No. 9, before whom said cause was tried and presiding in said division of said court at the time of the signing of this bill of exceptions.

Approved:
Thomas Bond,
Attorney for Plaintiff.

James F. Green,
M. U. Hayden,
Attorneys for Defendant.

Appellant has heretofore filed in this court the transcript required by law to be filed, and on the foregoing record the case is now pending in this court.

JAMES F. GREEN,
M. U. HAYDEN,
Attorneys for Appellant.

[fol. 56] IN ST. LOUIS COURT OF APPEALS

[Title omitted]

STATEMENT, BRIEF, AND ARGUMENT OF APPELLANT—Filed Feb. 29, 1924

Statement

The Pleadings

This suit was instituted in the Circuit Court, City of St. Louis, Missouri, on the 11th day of September, 1922, summons being re- [fol. 57] turnable to the October, 1922, Term of said court. Issue was joined upon a second amended petition filed by respondent, which petition (omitted caption and signatures) is as follows, to wit:

Second Amended Petition

"Plaintiff comes by her attorney and, by leave of Court, files this, her second amended petition, and for cause of action states that at all the times hereinafter mentioned defendant was and is a corporation duly organized and incorporated under the laws of the State of Missouri, relating to the formation of railroad companies, and having its principal office and agents for the transaction of its usual and customary business in the City of St. Louis, State of Missouri; that at all of said times defendant owned and operated a line of railroad extending from the City of Jefferson City, in the State of Missouri, to the City of Sedalia, in the State of Missouri, and that defendant was and is a common carrier for hire of goods, passengers and baggage between said points, and that said railroad, owned and operated by defendant as aforesaid, runs into and through the City of St. Louis, Missouri.

"Plaintiff further states that on, to wit, the 3rd day of January, 1922, she became and was a passenger for hire on the defendant's said railroad from Jefferson City, Missouri, to Sedalia, Missouri, and, as a passenger thereof, delivered to defendant, at Jefferson City, Missouri, in good and proper condition, her baggage, consisting of one trunk containing wearing apparel and other articles of personal use and convenience; that in consideration of plaintiff becoming [fol. 58] a passenger on said railroad, and paying the lawful and customary fare, which said fare plaintiff duly paid to defendant, defendant agreed and promised, well and safely and without delay, to carry said baggage from Jefferson City, Missouri, to Sedalia, Missouri, as aforesaid, and at the latter place to deliver same to plaintiff in as good condition as when received by defendant.

"Plaintiff further states that defendant, in violation of said agreement, and in total disregard of its duty as a common carrier, as aforesaid, failed and neglected to deliver said baggage at its destination to plaintiff, or to anyone for her, in as good condition as when

received by it, but, in disregard of its duty as aforesaid, (wrongfully) delivered said trunk and its contents to one John H. Clark, and that as a result of said wrongful act, as aforesaid, said trunk was not delivered to plaintiff for more than one month thereafter and in a broken and damaged condition and with the following articles of wearing apparel missing therefrom, to wit::

One sealskin coat, large gray opossum collar, lined with gray silk satin from collar to waist line, below waist line with green satin with silver flowers, bought two years before loss;
One black crepe dinner dress, heavily embroidered in pearls, blue and silver thread, two months old;
One gray crepe evening dress, heavily embroidered in cut steel beads;
One pair black brocaded strap slippers, bought at French Bootery, New York;
One pair black suede slippers;
One black taffeta afternoon gown;
[fol. 59] One brown tailored suit;
One Batik tea gown;
Four pairs satin bloomers;
Six silk combinations;
Two silk crepe nightgowns;
One pair pink silk pajamas;
Fourteen pairs silk stockings;
Six handkerchiefs;
Two pairs white gloves.

"That said articles were and are of the reasonable value of $1,398.00, and that all of same have been wholly lost to plaintiff.
"Wherefore, plaintiff prays judgment against defendant for the sum of one thousand three hundred ninety-eight dollars ($1,398.00), with interest thereon at the rate of 6 per cent per annum, and for costs of this suit."

To this petition appellant, in due time, filed its amended answer, which answer (omitting caption and signatures) is as follows:

Amended Answer to Second Amended Petition

"Comes now the defendant in the above-entitled cause, by leave of Court, and for its amended answer to the second amended petition of the plaintiff filed herein, admits that on the 3rd day of January, 1922, plaintiff became and was a passenger upon defendant's railroad from Jefferson City, Mo., to Sedalia, Mo., and, as a passenger thereof, delivered to defendant at Jefferson City, Mo., her baggage consisting of one trunk and contents, and defendant denies each and every allegation in said petition contained.
"Further answering, defendant says that, prior to the 3rd day of January, 1922, by virtue of the provisions of certain acts of Congress [fol. 60] known as the Interstate Commerce Act and the Federal

Control Act, the Director General of Railroads, had promulgated a general order laying down certain rules with reference to baggage tariffs, which was duly filed with the Interstate Commerce Commission at Washington, D. C., in accordance with the provisions of said acts, and by which said order, rules and tariffs it was provided that, unless a greater sum was declared by a passenger, and charges paid for excess value, at the time of delivery to a carrier, the value of property belonging to, or check for, such passenger should be deemed and agreed to be not in excess of one hundred dollars ($100.00), and, by said rules and tariffs, the liability of the carrier was limited, in the event of loss or damage to baggage, to one hundred dollars ($100.00), unless a greater value was declared by the passenger at the time of delivery to the carrier and certain charges paid for the value of said baggage in excess of one hundred dollars ($100.00), and defendant says that said rules and tariffs governed the transportation of baggage by defendant for passengers upon its line of railroad between points on its said line within the State of Missouri, and from Jefferson City, Missouri, to Sedalia, Missouri, as well as from points in Missouri to points in other states of the United States, and defendant states that said rules and tariffs so promulgated and filed by the Director General of Railroads, as aforesaid, remained and continued in full force and effect until February 29, 1920.

"Defendant further says that, by an act of Congress in effect on March 1, 1920, and thereafter, commonly called and known as the [fol. 61] Transportation Act, by Section 208 (a) thereof, it was provided that all rates, fares and charges and all classifications, regulations and practices in anywise changing, affecting or determining any part, or the aggregate, of rates, fares or charges, or the value of the service rendered, which on February 29, 1920, were in effect on the lines of carriers subject to the Interstate Commerce Act, should continue in force and effect until thereafter changed by state or federal authority, respectively, or pursuant to authority of law, and defendant states that, at the time of the passage of said act, and prior and subsequent thereto, it was and now is a carrier subject to the Interstate Commerce Act, and defendant further states that said rules and tariffs governing the transportation of baggage, so promulgated and filed by the Director General of Railroads, which were in effect on February 29, 1920, were not after said 1st day of March, 1920, and prior to said 3rd day of January, 1922, changed by either state or federal authority, or pursuant to authority of law, and defendant further states that said rules and tariffs were in full force and effect and binding upon both plaintiff and defendant on said 3rd day of January, 1922, and that the baggage of plaintiff was accepted for transportation by defendant subject to said rules and tariffs, and all of the provisions thereof.

"Defendant further says that, in accordance with the provisions of the laws of this state, the defendant was prohibited from engaging or participating in the transportation of passengers, or property, between points within this state, until its schedule of rates, fares and charges had been first filed and published with the Public Service Commission of Missouri, and that defendant was further prohibited

[fol. 62] from charging, demanding or collecting or receiving a greater or less, or different, compensation for the transportation of passengers or property, or for any service in connection therewith, than the rates, fares and charges applicable to such transportation, as specified in its schedule filed with said Public Service Commission, and in effect at the time, and defendant states that, prior to said 3rd day of January, 1922, defendant had been authorized by said Public Service Commission of Missouri to file, and had filed, with said Commission, its tariffs, containing its rates, fares and charges for the transportation of passengers and property between points in this state, in and by which schedules it was provided that, unless a greater sum was declared by a passenger and charges paid for excess value at the time of delivery of baggage to the carrier, the value of property belonging to, or checked for, a passenger should be deemed and agreed to be not in excess of one hundred dollars ($100.00), and in and by which schedules the liability of defendant for the transportation of baggage, in the event of loss or damage to same, was limited to one hundred dollars, unless, at the time of the delivery thereof to defendant, the passenger declared a higher value and paid charges for such value in excess of said sum of one hundred dollars ($100.00), and defendant states that said rates, fares and charges so filed by it with said Public Service Commission of Missouri were in full force and effect on said 3rd day of January, 1922.

"Defendant further states that plaintiff's baggage was accepted by defendant and defendant agreed to transport, and undertook the transportation thereof subject to all tariff regulations, and that notice [fol. 63] thereof was duly given to plaintiff at the time of the acceptance by defendant of said baggage for transportation.

"And defendant further states that, at the time of the delivery of said baggage by the plaintiff to it, plaintiff neither declared any greater sum or value of said baggage than one hundred dollars ($100.00), nor paid, nor offered to pay, charges for the value of said property, if any, in excess of one hundred dollars ($100.00), for which reason, if entitled to recover at all herein, plaintiff is not entitled to recover any greater sum than one hundred dollars ($100.00).

"Further answering, defendant states that, upon delivery of said baggage to defendant, plaintiff did not state, or offer to state, the value of said baggage in excess of one hundred and fifty dollars ($150.00), and did not obtain a written receipt stating the value of said baggage, and did not pay, or offer to pay, a reasonable charge for the assumption by defendant of liability in excess of one hundred and fifty dollars ($150.00), as provided by the laws of this state.

"Wherefore, having fully answered said amended petition, defendant prays to be dismissed with its costs."

To this answer respondent filed her reply, which (omitting caption and signatures) is as follows:

Reply

"Now comes plaintiff, by her attorney, and for her reply to the amended answer of the defendant heretofore filed herein, denies each [fol. 64] and every allegation therein made or contained, and again prays for judgment as prayed for in her second amended petition."

The Facts

The case was tried upon a stipulation as to certain facts and upon the testimony of respondent as to other facts. The evidence tended to establish that on the 3rd day of January, 1922, respondent delivered to appellant's agent at Jefferson City, Missouri, her trunk containing certain wearing apparel to be transported over appellant's railroad to Sedalia, Missouri; that said trunk was checked by appellant's agent at Jefferson City for transportation over appellant's railroad to Sedalia, Missouri; that it reached Sedalia, Missouri, and was received by appellant's agent at that point on the evening of January 3, 1922, but that shortly after the arrival of said trunk at Sedalia, Missouri, and while it was in the baggage room at appellant's station at that point, one John H. Clark removed the check which had been attached to the trunk at Jefferson City, Missouri, and substituted and attached to said trunk another check in lieu thereof, the duplicate of which latter check was in the possession of Clark, and that at some time during the night of January 3, 1922, the trunk and contents were delivered by appellant's agent at Sedalia to a local drayman acting as the agent of said Clark upon the presentation, by said local drayman, of the duplicate check referred to, and that said Clark then caused the trunk to be shipped out of Sedalia over another railroad.

Respondent testified that she left St. Louis on December 27th and [fol. 65] went to Jefferson City; that on the evening of January 3, at about 5:25, she left Jefferson City for Sedalia to visit some relatives, traveling over the Missouri Pacific; that she purchased from appellant's ticket agent at Jefferson City her ticket on which she checked her trunk in the baggage room at the station at Jefferson City, receiving from the baggage agent a check covering the transportation of the trunk (said check was identified by her as Plaintiff's Exhibit B, but same was offered in evidence by appellant); that she packed the trunk herself and that it contained the articles of wearing apparel set forth in her petition; that she reached Sedalia at about 7 o'clock in the evening of January 3, 1922; that on the following day she inquired about her trunk and was first informed that it had not arrived at Sedalia; that on the day following that she made a further inquiry and was then informed that the trunk had been stolen; that the trunk was not delivered to her until some four weeks later; that she did not know John H. Clark and never authorized anybody to deliver the trunk to him; that she had no knowledge of the fact that the trunk had been delivered to said Clark until she was so informed by appellant's agent; that when she next saw the trunk, four weeks after her arrival in Sedalia, it was at appellant's station, having been recovered; that it was delivered to her in St. Louis about the first or

second of February, and that all of the articles referred to in her petition were then gone.

Respondent also testified to the respective values of the different articles claimed to have been in the trunk at the time that it was stolen.

[fol. 66] On cross-examination, respondent testified that she purchased her ticket at Jefferson City herself; that she attended to the checking of her trunk herself; that she had no conversation, at the time the trunk was checked, with the man who checked it in reference to the value of the trunk or the contents, and that she did not at that time declare any value on the trunk or contents.

On redirect examination she testified that, at the time she purchased the ticket, the agent did not say anything to her about declaring any value; that he did not mention any tariff or tariff provisions; that she heard nothing about any choice of rates based on value; that he only told her the fare was so much and she paid it; that the baggage man. when he checked the trunk, did not say anything about tariff provisions or a choice of rates, and did not request her to make any declaration of value; that she did not make any declaration of value, and that she did not, at that time, know anything about any tariff publications or their contents.

Appellant offered certain tariffs filed with the Interstate Commerce Commission by the Director General of Railroads, purporting to be in effect at the time involved in this case, as well as a decision of the Public Service Commission of Missouri, the report of said Commission and an order purporting to have been entered by said Commission on or about the first day of September, 1920, all tending to establish the allegations of appellant's amended answer. More extended reference to these tariffs and the decision and order of the Public Service Commission will be made in the argument. The evi-[fol. 67] dence thus offered was all excluded by the Court upon objection of respondent.

Appellant also offered, and the Court admitted, in evidence Plaintiff's Exhibit B, being the check delivered to respondent when the trunk was checked for transportation from Jefferson City to Sedalia. On said check was the following:

"Missouri Pacific Railroad Company transported subject to tariff regulations.

W. H. Bissland, Gen'l Ag't, St. Louis, Mo.

Passenger's duplicate from Jefferson City, Mo., to Sedalia, Mo., routed via Mo. Pac. R. R."

At the close of respondents' evidence appellant requested an instruction in the nature of a demurrer to the evidence, which the Court refused; to which action of the Court appellant then and there saved its exceptions.

Again, at the close of all the evidence, appellant requested an instruction in the nature of a demurrer to the evidence, which was by the Court refused and appellant duly saved its exception.

Appellant further submitted and requested the Court to give and read to the jury instruction marked "A," purporting to limit respondent's recovery, in the event that the jury found in her favor to $100.00; to which action of the Court appellant duly saved its exception.

The case was submitted to the jury upon instructions given at the instance of respondent, by one of which the jury were authorized, in the event that it found in her favor, to award her damages not to ex-
[fol. 68] ceed the sum of $1,398.00, and appellant saved its exception to the giving of each of said instructions.

The jury returned a verdict in favor of respondent and against appellant in the sum of $1,060.00.

Thereafter, and in due time, appellant filed its motions for new trial and in arrest of judgment, which motions were, by order of the Court, duly entered of record, overruled, and thereupon appellant prayed for and was allowed an appeal to this court.

[fol. 69] Assignment of Errors

I

The trial court erred in excluding, upon objection of respondent, competent, relevant and material testimony offered by appellant.

II

The trial court erred in refusing the instruction offered and requested by appellant, both at the close of plaintiff's testimony and at the close of all the testimony in the nature of demurrers to the evidence and in not at that time instructing the jury to return a verdict in favor of defendant.

III

The trial court erred in giving and reading to the jury, over the objection of appellant, instructions numbered 1 and 2 at the instance of respondent.

IV

The trial court erred in refusing to give and read to the jury instruction marked A, offered and requested by appellant.

V

The trial court erred in failing to instruct the jury to return a verdict in favor of respondent and against appellant for the sum of one hundred dollars ($100).

[fol. 70] VI

The trial court erred in not sustaining appellant's motion for a new trial upon the fifteenth, sixteenth, seventeenth, eighteenth and twenty-first grounds thereof.

[fol. 71] Brief

Points and Authorities

I

By the Act of Congress known as the Interstate Commerce Act (24 Stat. L. 379; 34 Stat. L. 584; 41 Stat. L. 483) it was made the duty of every common carrier, subject to the provisions of said act, to file with the Interstate Commerce Commission certain schedules showing all rates, fares and charges for transportation of persons and property between different points on its own route and between points on its own route and points on the route of any other carrier. The schedule of rates, fares and charges so filed and published were binding upon both the carriers and shippers and were the only lawful rates which could be collected by the carrier for transportation of passengers and property in interstate commerce.

24 Stat. L. 379, as amended by 34 Stat. L. 584 and 41 Stat. L. 483;
Boston & Maine Railroad v. Hooker, 233 U. S. 97;
Railway Co. v. Rankin, 241 U. S. 319;
Express Co. v. Levee, 44 Sup. Ct. Rep. 11;
Railroad Co. v. Sawmill Co, 251 S. W. 434;
Railroad Co. v. Maxwell, 237 U. S. 94.

II

Under the provisions of said act a carrier engaged in interstate [fol. 72] commerce has the right to file with the Interstate Commerce Commission tariffs and regulations governing the transportation of baggage in interstate commerce limiting its liability for loss of or damage to such baggage to a certain amount unless a greater value is declared by the passenger at the time of delivering and checking the baggage for transportation and such limitation of liability is valid and binding upon both carrier and passenger.

Authorities cited under point I;
Express Co. v. Levee, 44 Sup. Ct. Rep. 11;
Hines v. Burnett, 107 S. E. 657;
Powell v. Hines, 104 S. E. 533;
Express Co. v. Lindenburg, 260 U. S. 584;
Express Co. v. Croninger, 226 U. S. 491;
Kansas City Southern Ry. Co. v. Carl, 227 U. S. 652.

III

Provisions in such tariffs so filed and published are binding upon the passenger and shipper even though the carrier does not notify him or call his attention thereto at the time of the checking of the baggage.

Railroad v. Hooker, 233 U. S. 97;
Hines v. Burnett, 107 S. E. 657;

Express Co. v. Lindenburg, 260 U. S. 584;
Express Co. v. Croninger, 226 U. S. 491;
Railway Co. v. Carl, 227 U. S. 652;
Express Co. v. Levee, 44 Sup. Ct. Rep. 11.

IV

In accordance with the Act of Congress of August 29, 1916, the President of the United States, through the Director General of [fol. 73] Railroads, on December 28, 1917, took possession, and assumed control, of the operation of the various railroads of the United States, including appellant, and thereafter and until February 29, 1920, appellant's railroad was under the operation of the Federal Government.

39 Stat. L. 645;
Proclamation of the President, December 26, 1917.

V

Section 10 of the Act of Congress of March 21, 1918, provided that the President, in the operation of the transportation systems while under federal control, might initiate rates, fares, charges, classifications and regulations for the transportation of both passengers and property. And thereafter the Director General of Railroads made an order establishing a schedule of rates for all roads under his control, including appellant, effective in June, 1918, and covering all classes of service, intrastate as well as interstate. Included in that schedule was a provision limiting appellant's liability for loss of, or damage to, baggage to the sum of one hundred dollars unless, at the time of delivering same to the carrier for transportation, the passenger declared a greater value and paid an excess rate for transportation of same. This was a valid provision binding upon both passenger and carrier and applicable to baggage transported in either intrastate or interstate commerce.

39 Stat. L. 645;
40 Stat. L. 451;
Northern Pacific Ry Co. v. State of North Dakota, 250 U. S. 135;
[fol. 74] Powell v. Hines, 104 S. E. 533;
Hines v. Burnett, 107 S. E. 657;
Express Co. v. Lindenburg, 260 U. S. 584;
Express Co. v. Levee, 44 Sup. Ct. Rep. 11.

VI

The Act of Congress known as the Transportation Act, 1920, expressly provided that all rates, regulations and practices in effect on February 29, 1920, on the lines of carriers subject to the Interstate Commerce Act (which included appellant) should continue in force and effect "until thereafter changed by state or federal authority, respectively."

Transportation Act 1920, 41 Stat. L. 464, Sec. 208 (a).

VII

In view of the provisions of these various Acts of Congress, as interpreted by the Supreme Court of the United States in the cases heretofore cited, the evidence offered by appellant tending to establish (1) that during the period of federal control the Director General of Railroads in charge of the operation of appellant's railroad had filed with the Interstate Commerce Commission a regulation for the transportation of baggage limiting its liability in the event of loss of, or damage to, baggage to the sum of one hundred dollars in the absence of a declaration by the passenger of a greater value and the payment of an excess rate, and (2) the order of the Public Service Commission of Missouri that such regulation had been continued in force in Missouri and was in force at the time [fol. 75] of the loss of respondent's trunk, was competent, material and relevant, and its exclusion by the trial court was reversible error.

Authorities cited under points III, IV, and V.

VIII

Under the provisions of Section 10499, R. S. 1919 Mo., appellant, having been authorized by the Public Service Commission of Missouri to continue said baggage regulation in force in this state, could in no event be held liable for any greater amount than one hundred and fifty dollars, and for that reason the trial court erred in excluding the evidence offered by appellant.

Sec. 10499, R. S. Mo. 1919.

[fol. 76]

Argument

The various errors assigned by appellant in this case pertain to but one question, which is, whether appellant is liable for the full amount of damage claimed by respondent and, for the most part, awarded by the jury or whether because of the existence of certain tariffs and regulations on file with both the Interstate Commerce Commission and the Public Service Commission of Missouri, in support of which appellant offered proper evidence, the liability of appellant was limited to the sum of one hundred dollars as set forth in said tariffs or to the sum of one hundred and fifty dollars as provided by statute of this state.

The transportation of respondent's trunk and contents, during which the alleged loss occurred, was intrastate. Nevertheless, appellant contends, first, that the same regulation governed and limited its liability as would have governed had the transportation been interstate and, especially that, in any event, the statute in force in this state (Section 10499, R. S. Mo. 1919) limited appellant's liability to a sum not in excess of one hundred and fifty dollars.

So far as the transportation of baggage in interstate commerce is concerned, the law is, of course, plain that it was not only the right but the duty of appellant to publish and file with the Interstate

Commerce Commission its tariffs and tariff regulations governing such transportation and to abide by the provisions thereof. The act of Congress known as the Interstate Commerce Act so provided and the decisions of the courts so declare.

[fol. 77] The Interstate Commerce Act (24 Stat. 379, 34 Stat. 584) provides, in part, as follows:

"Sec. 6. (1) That every common carrier subject to the provisions of this act shall file with the Commission created by this act and print and keep open to public inspection schedules showing all the rates, fares and charges for transportation between different points on its own route and between points on its own route and points on the route of any other carrier by railroad, by pipe line, or by water, when a through route and joint rate have been established. * * *

"(7) No carrier, unless otherwise provided by this act, shall engage or participate in the transportation of passengers or property, as defined in this act, unless the rates, fares and charges upon which the same are transported by said carrier have been filed and published in accordance with the provisions of this act; nor shall any carrier charge or demand or collect or receive a greater or less or different compensation for such transportation of passengers or property, or for any service in connection therewith, between the points named in such tariffs than the rates, fares and charges which are specified in the tariff filed and in effect at the time; nor shall any carrier refund or remit in any manner or by any device any portion of the rates, fares and charges so specified, nor extend to any shipper or person any privileges or facilities in the transportation of passengers or property, except such as are specified in such tariffs."

These provisions have been frequently construed by the Supreme Court of the United States and by this Court.

[fol. 78] The case of Express Co. v. Levee, 44 Sup. Ct. Rep., 11 (decided by the Supreme Court of the United States on October 22, 1923), was brought to recover the actual value of a trunk and contents which was delivered to the petitioner for carriage from a point in Texas to one in Louisiana. The receipt issued was in the usual form approved by the Interstate Commerce Commission and contained a provision for limitation of liability based upon an agreed value of not exceeding $50.00 for any shipment of 100 pounds or less. In the trial court, the plaintiff recovered judgment for the full amount claimed, which judgment was affirmed on appeal and the case was taken on writ of certiorari to the Supreme Court of the United States, where the judgment was reversed, the latter Court saying:

"Coming to the merits, the limitation of liability was valid, whatever may be the law of the state in cases within its control (authorities cited).

* * * * * * *

"The law of the United States cannot be evaded by the forms of local practice."

In Mobile & Ohio R. R. Co. v. Southern Saw Mill Co., 251 S. W., 434, this Court said:

"The shipment was interstate, and not only is the Interstate Commerce Commission the proper tribunal to determine the reasonableness of such rates, but we must look to the decisions and statutes of the United States to control our views wherever we find expression [fol. 79] or light from that source.

"We begin with the thoroughly settled rule that the legal rate is the filed rate, and it is the duty of the carrier to charge and collect the rate precisely as same is contained in the tariffs on file with the Interstate Commerce Commission."

Again in the opinion, the following from the decision of the United States Supreme Court in Railroad Co. v. Maxwell, 237 U. S., 94, was quoted with approval:

"Under the Interstate Commerce Act, the rate of the carrier duly filed is the only lawful charge. Deviation from it is not permitted upon any pretense. Shippers and travelers are charged with notice of it and they, as well as the carriers, must abide by it, unless it is found by the Commission to be unreasonable. Ignorance or misquotation of rates is not an excuse for paying or charging either less or more than the rate filed. This rule is undeniably strict and it obviously may work hardship in some cases, but it embodies the policy which has been adopted by Congress in the regulation of interstate commerce in order to prevent unjust discrimination."

Under the law, the carrier thus had the right and was bound to provide and enforce a regulation limiting its liability for loss of, or damage to, baggage transported in interstate commerce, and such a regulation was binding upon the shipper without reference to whether the latter knew of the regulation or whether he had his attention called to it when checking the baggage, or had been given [fol. 80] an opportunity to declare a greater value than one hundred dollars.

He was presumed to know of such regulation.

In Boston & Maine Railroad v. Hooker, 233 U. S., 97; L. R. A. 1915-B, 450, the Court had under consideration the question of the right of a railroad company to limit its liability for baggage transported in interstate commerce. It there appeared that the railroad company had published and filed with the Interstate Commerce Commission certain tariff regulations for the transportation of baggage containing provisions limiting the free transportation of baggage to a certain weight and the liability of the carrier to one hundred dollars, followed by a table of charges for excess weight, and also containing the provision for a charge for excess value.

The Supreme Judicial Court of Massachusetts, in deciding the case, held that the Interstate Commerce Act did not in anywise

change the common-law rule that regulations of this character, limiting the amount of recovery for baggage lost must be brought home to the knowledge of the shipper and assented to or circumstances shown from which assent might be implied.

The Supreme Court of the United States reversed the holding of that court and said:

"Since the decision in the Hughes case (Railroad v. Hughes, 191 U. S., 477) the Hepburn Act of June 29, 1906, has been passed and [fol. 81] this Court has held that, by virtue of that act (particularly section 20, the Carmack Amendment) the subject of interstate transportation of property has been regulated by federal law to the exclusion of the power of the states to control in such respect by their own policy or legislation" (authorities cited).

"The cases in 226 and 227 U. S. (referring to the cases of Express Co. v. Croninger, 226 U. S., 491, and Kansas City Southern Ry. Co. v. Carl, 227 U. S., 652), it is true, involved liability for express or freight shipments made upon express receipts, bills of lading or separate contracts, showing on their face or by reference to tariffs the opportunity for valuation for the purpose of fixing the rate and liability, and the limitation appearing in such form of contract was declared to be valid and effectual to relieve the carrier from a greater liability than that therein expressed. But the Court did not stop there. In Adams Express Co. v. Croninger, supra, p. 509, it said: 'The knowledge of the shipper that the rate was based upon the value is to be presumed from the terms of the bill of lading and of the published schedules filed with the Commission.'

"In Kansas City Southern Ry. Co. v. Carl, 227 U. S., 652, this Court said: 'The valuation the shipper declares determines the legal rate where there are two rates based upon valuation. He must take notice of the rate applicable, and actual want of knowledge is no excuse. The rate when made out and filed is notice, and the effect is not lost, although it is not actually posted in the station (authorities cited). It would open a wide door to fraud and destroy the uniform operation of the published tariff rate sheets. When there are two published rates, based upon difference in value, the [fol. 82] legal rate automatically attaches itself to the declared or agreed value. Neither the intentional nor accidental misstatement of the applicable published rate will bind the carrier or shipper. The lawful rate is that which the carrier must exact and that which the shipper must pay. * * * To the extent that such limitations of liability are not forbidden by law, they become, when filed, a part of the rate.' * * *

"Before these cases were decided this Court had held that the effect of filing schedules of rates with the Interstate Commerce Commission was to make the published rates binding upon shipper and carrier alike, thus making effectual the purpose of the act to have but one rate, open to all alike and from which there could be no departure (cases cited).

* * * * * * *

"It follows, therefore, from the previous decisions in this court, that if it be found that the limitation of liability for baggage is required to be filed in the carrier's tariffs, the plaintiff was bound by such limitation. Having the notice which follows from the filed and published regulations, as required by the statute and the order of the Interstate Commerce Commission, she might have declared the value of her luggage, paid the excess tariff rate and thus secured the liability of the carrier to the full amount of the value of her baggage, or she might, for the purpose of transportation, have valued it at $100.00 and received free transportation and liability to that extent only, or, as she did, she might have made no valuation of her baggage, in which event the rate and the corresponding liability would have automatically attached."

[fol. 83] The Court then quoted and discussed the provisions of the act of Congress known as the Interstate Commerce Act and certain rules of the Interstate Commerce Commission, and said:

"If the charges filed were unreasonable the only attack that could be made upon such regulation would be by proceedings contesting their reasonableness before the Interstate Commerce Commission. While they were in force they were equally binding upon the railroad company and all passengers whose baggage was transported by carriers in interstate commerce. This being the fact, we think the limitation of liability to $100 fixed the amount which the plaintiff could recover in this case, and there was error in affirming the recovery for the full value of the baggage, in the absence of a declaration of such value and payment of the additional amount required to secure liability in the greater sum.

"We do not think the requirement of the Carmack Amendment, that a railway company receiving property for transportation in interstate commerce shall issue a receipt or bill of lading therefor, required other receipts than baggage checks, which it is shown were issued when the baggage was received in this case. When the amendment was passed Congress well knew that baggage was not carried upon bills of lading, and that carriers had been accustomed to issue checks upon receipt of baggage. We do not think it was intended to require a departure from this practice when the matter was placed under regulation by schedules filed and subject to change for unreasonableness upon application to the Commission. Such checks are receipts, and there is no special requirement in the statute [fol. 84] as to their form. It is doubtless in the power of the Interstate Commerce Commission to make requirement as to the checks or receipts to be given for baggage if that subject needs regulation."

In the recent case of Express Co. v. Lindenburg, 260 U. S., 584 (decided January 8, 1923), the Supreme Court of the United States had under consideration the question of the right of an express company to limit its liability for transportation of property shipped by express. In that case the respondent caused to be delivered to the express company at Indianapolis, Indiana, two trunks weighing

200 pounds and 100 pounds, respectively, and a package weighing ten pounds, for transportation to him at Charleston, West Virginia. A receipt was given for the property, which recited that its terms and conditions were agreed to by the shipper. This receipt, among other things, stipulated that in no event should the company be held liable beyond the sum of $50.00 upon any shipment of 100 pounds or less and for not exceeding 50 cents per ton upon any shipment weighing more than 100 pounds, and further that the liability of the express company was limited to these values unless the true value was declared at time of shipment and the declared value in excess of the value above specified was paid for. At the time of the shipment the value of the property was neither stated by respondent nor demanded by the express company. The charges paid were on the basis of the limited liability set forth in the receipt. One of the trunks when delivered at destination was in bad order, for [fol. 85] which the respondent claimed damages in the sum of $1,-500.00. The company admitted liability for $110.00 under the terms of the receipt. The trial court gave judgment for $916.15, which the state appellate court affirmed and the case was taken to the United States Supreme Court on certiorari. That Court held that the case was governed by the provisions of the Cummins Amendment Act of March, 1915, Ch. 176, 38 Stat. 1196, as amended by the Act of August 9, 1916, Ch. 301, 39 Stat. 441, and in reversing the judgment of the state appellate court said:

"The judgment of the state appellate court is made to rest upon the sole ground that petitioner did not take from the shipper a written declaration of value or a written agreement as to value signed by him. Respondent here seeks to justify the judgment upon other grounds as well; and these we first consider. * * *

"It is a rule of general application that 'where an act is done which can be done legally only after the performance of some prior act, proof of the latter carries with it a presumption of the due performance of the prior act' (authorities cited).

"In the absence of proof to the contrary, we therefore, indulge the presumption that in basing its transporation charges upon the values recited in the receipt, the petitioner had due authority.

* * * * * * *

"We come now to the point on which the judgment of the state appellate court is grounded. That Court held that the petitioner should have given the shipper 'a receipt specifying a value fixed by himself, and evidenced by his signature * * * and that a [fol. 86] writing not signed by him, although specifying value, was not a declaration or agreement in writing by him' (case cited).

"Neither the statute nor the order of the Commission requires the signature of the shipper. The pertinent words of the statute are: '* * * rates dependent upon the value declared in writing by the shipper or agreed upon in writing as the released value * * *' It is not to be supposed that the Commission would attempt to add

anything to the substantive requirements of the statute, and its order does not purport to do so; but the form of receipt which the express companies were authorized to adopt contains a recital to the effect that as evidence of the shipper's agreement to the printed conditions he 'accepts and signs this receipt,' and a blank space is provided for his signature. Naturally, such signature would be desirable as constituting the most satisfactory evidence of the shipper's agreement, but it is not made a prerequisite without which no agreement will result, and a subsequent report of the Commission on the subject of bills of lading is persuasive evidence that there was no such intention.

* * * * * * *

"Having accepted the benefit of the lower rate dependent upon the specified valuation, the respondent is estopped from asserting a higher value. To allow him to do so would be to violate the plainest principles of fair dealing."

Such was the law affecting the rights and duties of both carrier and shipper with respect to baggage transported in interstate commerce prior to the period in the history of this country known as the period of Federal control of railroads, and we shall now show that [fol. 87] beginning with, and during that period, the same law and the same regulations existed with respect to both interstate and intrastate commerce.

By the Act of Congress of August 29, 1916 (39 Stat. 645) Congress gave to the President of the United States the power,

"in time of war * * * to take possession of and assume control of any system or systems of transportation or any part thereof and to utilize the same to the exclusion, as far as may be necessary, of all other traffic thereon," etc.

On December 26, 1917, the President, referring to the existing state of war and the power with which he had been vested by Congress in August, 1916, issued his proclamation that he would take possession and assume control of each and every system of transportation located in the United States, including railroads, at 12 o'clock noon on the 28th day of December, 1917.

In discussing the power thus conferred upon the President, and the effect of the proclamation, the Supreme Court of the United States, in the case of Northern Pacific Railway Co. v. State of North Dakota, 250 U. S. 135, said:

"By the proclamation a Director General of Railroads was appointed with full authority to take possession and control of the systems embraced by the proclamation and to operate and administer the same. To this end the Director General was given authority to avail himself of the services of the existing railroad officials, [fol. 88] boards of directors, receivers, employes, etc., who were authorized to continue to perform their duties in accordance with

previous authority 'until and except so far as said Director shall, from time to time, by general or special orders otherwise provide.' Limited by the same qualification the systems of transportation taken over by the Government were made subject to existing statutes and orders of the Interstate Commerce Commission and to all statutes and orders of regulating commissions of the various states in which said systems or any part thereof might be located."

On March 21, 1918, Congress passed an act entitled, "An Act to provide for the operation of transportation systems while under Federal control for the just compensation of their owners and for other purposes" (40 Stat. 451).

Section 10 of that act expressly provided that the President might initiate rates, fares, charges, classifications, regulations and practices by filing the same with the Interstate Commerce Commission.

In the Northern Pacific case just referred to the Court further said:

"On May 25, 1918, the Director General made an order establishing a schedule of rates for all roads under his control and covering all classes of service, intrastate, as well as interstate. The order made these rates effective on designated dates in the month of June."

Again, the Court said:

"No elaboration could make clearer than do the Act of Congress [fol. 89] of 1916, the proclamation of the President exerting the powers given, and the Act of 1918, dealing with the situation created by the exercise of such authority, that no divided but a complete possession and control were given the United States for all purposes as to the railroads in question. * * * This being true, it must follow that there is no basis for the contention that the power to make rates and enforce them which was plainly essential to the authority given was not included in it. * * * The complete and undivided character of the war power of the United States is not disputable. (Authorities cited.) On the face of the statutes it is manifest that they were in terms based upon the war power, since the authority they gave arose only because of the existence of war, and the right to exert such authority was to cease upon the war's termination. To interpret, therefore, the exercise of the power by a presumption of the continuance of a state power limiting and controlling the national authority was but to deny its existence. * * *

"The elementary principle that under the Constitution the authority of the Government of the United States which it has the power to control is indisputable. This being true, it results that although authority to regulate within a given sphere may exist in both the United States and in the states when the former calls into play constitutional authority within such general sphere the necessary effect of doing so is that to the extent that any conflict arises the state power is limited, since in case of conflict that which is paramount necessarily controls that which is subordinate.

The Court then held that by Section 10 of the Act of March 21, [fol. 90] 1918, the power given to the President to initiate fares, rates, charges, classifications, regulations and practices by filing the same with the Interstate Commerce Commission applied to intrastate traffic as well as to interstate traffic.

It is clear, therefore, that during the period of federal control the Director General of Railroads was authorized to file with the Interstate Commerce Commission schedules of rates, tariffs and regulations, and that when so filed such schedules, tariffs and regulations applied to intrastate as well as to interstate commerce. Among the schedules, tariffs and regulations which were so filed by the Director General was one limiting the carriers' liability in the event of loss of, or damage to, baggage to one hundred dollars, unless a greater value was declared when the baggage was checked and an excess rate paid. That regulation was held valid and binding even in cases involving intrastate shipments.

In the case of Powell v. Hines, Director General, 104 S. E., 533, the Supreme Court of North Carolina had under consideration this question when applied to a limitation of liability for baggage lost in transit. The action there was to recover the value of the baggage. The plaintiff was a passenger on the railroad which was under the management of the Director General of Railroads, on a trip from Durham, N. C., to Chadbourne, N. C. She was thus purely an intrastate passenger, and the transportation of the baggage was intrastate. The baggage was lost and suit was brought for the full value [fol. 91] of the baggage and contents. The defense set up was that the plaintiff was in no event entitled to recover more than $100.00, because of the fact that on May 25, 1918, the Director General of Railroads, by virtue of an act of Congress, promulgated a general order increasing freight rates and laying down certain rules with reference to baggage tariffs, which was duly filed with the Interstate Commerce Commission in accordance with the law and promulgated rules governing transportation of such baggage and limiting the recovery to $100.00. Upon the trial of this case judgment was rendered against the Director General for one hundred dollars, from which the plaintiff appealed. The Supreme Court affirmed the judgment, saying:

"The authority of the Director General to promulgate the order limiting the recovery for loss of baggage to $100.00 on intrastate as well as interstate transactions is fully sustained by Northern Pacific R. R. v. North Dakota, 250 U. S. 135."

This view was also announced by the Supreme Court of Appeals of Virginia in Hines, Director General, v. Burnett, 107 S. E., 657. In that case the plaintiff was an intrastate passenger, namely, from Petersburg, Va., to Richmond, Va., over the Atlantic Coast Line Railroad, operated by the Director General. She checked her trunk on the ticket purchased. She declared no value on her trunk. On the back of the check delivered to her there was stamped under

the title, "Notice to Passengers," a notice stating what was covered [fol. 92] by the word "baggage" and that "liability for baggage is limited to wearing apparel not to exceed $100.00 in value." The trunk was lost and never thereafter found. The defendant proved compliance with the Federal Control Act, the promulgation of tariff rates and rules and regulations affecting baggage, the filing of the same and compliance with its rules and regulations, with the Interstate Commerce Commission, and the limitation of the right to recover more than $100.00 for the value of baggage where no value was declared, and insisted that the recovery should be limited to $100.00. The plaintiff insisted that this was an intrastate transportation and was not affected by the Federal Control Act of March 21, 1918; that the notice of the limitation was not sufficient and that the regulation requiring the value to be declared and an additional sum paid where the baggage was of greater value than $100.00 was unreasonable. The trial court entered judgment for the plaintiff for $400.00, which amount on appeal was reduced to $300.00. In deciding the case, the Court said:

"The authority of the Director General of Railroads to promulgate a baggage regulation limiting the amount of recovery to $100.00 where no value is declared on intrastate as well as interstate transportation, the sufficiency of the notice of the regulation, and every objection raised to the application of the Federal Control Act have been settled by decisions of the Supreme Court adversely to the plaintiff's claim."

The Court then quoted from the opinion of the Supreme Court of [fol. 93] the United States in the Northern Pacific case, as follows:

"Under Section 10 of the Federal Control Act, the power of the Interstate Commerce Commission to consider rates, like the power of the President to initiate them, relates to both classes—intrastate and interstate."

The period of federal control terminated on February 29, 1920, and the foregoing authorities clearly support the proposition that, down to that date, the Director General of Railroads was authorized to file and did file tariffs and regulations covering the transportation of baggage in both intrastate and interstate commerce, whereby the right to limit the liability for loss of such baggage existed.

As stated, that was the situation which prevailed at the termination of federal control.

The Act of Congress known as the Transportation Act, 1920, went into effect on February 29, 1920, and Section 208 (a) provides as follows:

"All rates, fares and charges and all classifications, regulations and practices in anywise changing, affecting or determining any part or the aggregate of rates, fares or charges or the value of the service rendered which on February 29, 1920, are in effect on the lines of carriers subject to the Interstate Commerce Act shall continue in

force and effect until thereafter changed by state or federal authority, respectively, or pursuant to authority of law; but prior to September 1, 1920, no such rate, fare or charge shall be reduced and no such classification, regulation or practice shall be changed in such [fol. 94] manner as to reduce any such rate, fare or charge unless such reduction or change is approved by the Commission."

In view of the law as declared by these various acts of Congress and the decisions of the courts cited, the situation existing in this case is this: If, by virtue of those statutes and decisions and in obedience thereto, it was not only the right but the duty of the Director General of Railroads to file with the Interstate Commerce Commission a baggage tariff or regulation limiting the liability of the carrier in the event of loss of, or damage to, baggage transported in both interstate and intrastate commerce to one hundred dollars ($100.00) unless, at the time of the delivery of such baggage to the carrier for transportation, the passenger declared a greater value and paid, or offered to pay, an excess rate for transporting it; and if the Director General of Railroads did file with the Interstate Commerce Commission such a baggage tariff or regulation; and if, by the provisions of the Transportation Act, such tariff or regulation was to remain in force after the termination of federal control and until changed by state or federal authority; and if, thereafter, neither the Interstate Commerce Commission nor the Public Service Commission of Missouri ordered such tariff or regulation changed; and if, by order of the Public Service Commission of Missouri, said tariff or regulation was expressly continued in force in Missouri until the date on which respondent delivered her trunk to appellant for transportation from Jefferson City to Sedalia, then, certainly, appellant's [fol. 95] liability for the loss of said trunk was limited to either the amount specified in such tariff or regulation or to the amount named in Section 10499, R. S. Mo. 1919.

Upon the trial of this case respondent produced and identified the check given to her by appellant's baggage agent at Jefferson City, Missouri, when the trunk was checked (Plaintiff's Ex. B, Abs., p. 15). Appellant offered in evidence and the Court admitted that check (Abs., p. 33) and it contained the statement, "transported subject to tariff regulations."

Appellant offered to prove that the Director General of Railroads had filed with the Interstate Commerce Commission a baggage tariff or regulation by which the liability of the carrier for loss of, or damage to, baggage was limited to one hundred dollars ($100.00) unless a greater value was declared by the passenger at the time of delivering the baggage to the carrier and an excess rate was paid or tendered (Abs., pp. 19-23). Appellant further offered to prove that such tariff or regulation was in force in Missouri by express order of the Public Service Commission on the date of this shipment and applicable to baggage transported in intrastate commerce, as was respondent's baggage (Abs., pp. 23-33). This evidence was all excluded by the trial court upon objection of respondent.

We submit that, unless all of the authorities cited are to be wholly

disregarded, this evidence was competent and admissible in view of respondent's testimony that she did not declare any value on her trunk and contents in excess of one hundred dollars ($100.00) when she checked the same, and that she did not pay, or offer to pay, any excess rate for the transportation of same.

[fol. 96] This evidence is set forth in full in the abstract (pp. 23-33) and consisted of (1) baggage tariff No. 25-2 filed by the Director General of Railroads with the Interstate Commerce Commission prior to the termination of federal control; (2) the report, decision and order of the Public Service Commission of Missouri continuing said baggage tariff 25-2 in force after the termination of federal control and of "Western Passenger Bureau, Missouri Supplement No. 6," canceling said baggage tariff No. 25-2, effective March 1, 1922.

In other words, the last-named document—Supplement No. 6—was offered for the purpose of showing that the regulation with respect to the limitation of liability for loss of baggage contained in tariff 25-2, remained in full force and effect in Missouri and applicable to baggage transported in intrastate commerce until March 1, 1922—some three months after respondent's alleged loss—when it was canceled by Supplement No. 6.

We contend that this evidence should have been admitted and, when considered in evidence, it clearly established, as a matter of law and without conflict in the testimony, appellant's right to limit its liability to the sum of one hundred dollars ($100.00), under the circumstances therein mentioned which circumstances were supported by the record in this case, unless it be held that the Public Service Commission of Missouri is without authority to permit the filing and enforcement of a tariff or regulation limiting the carrier's liability to a smaller sum than that provided in Section 10499, R. S. [fol. 97] Mo. 1919, which is in part as follows:

"Every common carrier and railroad corporation shall be liable for loss, damage and injury to property carried as baggage up to the full value and regardless of the character thereof, but the value in excess of one hundred fifty dollars ($150.00) shall be stated upon delivery to the carrier and a written receipt stating the value shall be issued by the carrier who may make a reasonable charge for the assumption of such liability in excess of one hundred fifty dollars ($150.00) and for the carriage of baggage exceeding 150 pounds in weight upon a single ticket. Nothing in this section shall deprive any holder of such receipt or bill of lading of any remedy or right of action which he has under existing laws."

If the Court be of the opinion that, by virtue of the provisions of this statute, the Public Service Commission of Missouri has not the power to permit a carrier to limit its liability to any smaller sum than one hundred fifty dollars ($150.00), even then respondent's recovery cannot exceed that sum in view of the authorities heretofore referred to and the evidence in this record.

We respectfully submit that this judgment should be reversed and

remanded to the trial court with directions to enter a judgment in favor of respondent and against appellant for either the sum of one hundred dollars ($100.00) or the sum of one hundred fifty dollars [fols. 98 & 99] ($150.00) according to whether this Court shall hold that the amount mentioned in the tariff filed with and authorized by the Public Service Commission of Missouri, or the amount mentioned in section 10499 of our statutes is to prevail.

James F. Green, M. U. Hayden, Attorneys for Appellant.

[fol. 100] IN ST. LOUIS COURT OF APPEALS

[Title omitted]

STATEMENT, BRIEF, AND ARGUMENT FOR RESPONDENT—Filed March 25, 1924

Statement

This is an action against a common carrier in tort for the conversion or misdelivery of a trunk. The second amended petition is grounded squarely in tort, as follows (Abs., p. 3):

"Plaintiff further states that defendant, in violation of said agree-[fol. 101] ment, and in total disregard of its duty as a common carrier, as aforesaid, failed and neglected to deliver said baggage at its destination to plaintiff, or to anyone for her, in as good condition as when received by it, but in disregard of its duty, as aforesaid, wrongfully delivered said trunk and its contents to one John H. Clark, and that as a result of said wrongful act, as aforesaid, said trunk was not delivered to plaintiff for more than one month thereafter and in a broken and damaged condition, and with the following articles of wearing apparel missing therefrom, to wit:"

The admitted facts are that on the 3rd day of January, 1922, plaintiff was a passenger upon defendant's railroad from Jefferson City, Missouri, to Sedalia, Missouri, and as a passenger thereof delivered to defendant's agent at Jefferson City her baggage, consisting of one trunk and the contents thereof, which were checked for transportation to Sedalia, Missouri; that said trunk arrived at Sedalia, Missouri, on the evening of January 3, 1922, and while in possession of defendant's agent at Sedalia, Missouri, some person by the name of John H. Clark, without the knowledge or consent of the plaintiff, removed the check which had been attached to said trunk and substituted another pretended check in lieu thereof; that thereafter and during the same night or the early morning of the next day, said Clark sent a drayman with the duplicate of the substitute check to the defendant's station and baggage room, and defendant's agent, without the knowledge, authority or consent of the plaintiff, and without requiring the surrender of the duplicate check which had been issued to plaintiff at [fol. 102] Jefferson City, delivered the plaintiff's trunk to the agent

of said Clark, and Clark thereafter made away with it (Stipulation, Abs., pp. 13, 14). When the trunk was finally recovered from said Clark and delivered to the plaintiff, the articles referred to in the petition were missing therefrom.

It is the defendant's duty to know its own baggage checks, and in delivering this trunk to a party not presenting the duplicate check which had been issued at Jefferson City to the plaintiff, the defendant was guilty of a conversion, and is liable to the plaintiff for the value of the property so converted and lost. The liability is admitted. The defense is that this admitted liability should, by reason of certain provisions in published tariffs, be limited to the sum of one hundred dollars ($100.00).

This defense is set up in the amended answer (Abs., p. 4), being, in substance, that during federal control, the Director General of Railroads, by general order, laid down certain rules with reference to baggage tariffs which provided, among other things, that unless a greater sum was declared by passengers and charges paid for excess value, the liability of the carrier "in case of loss or damage" should be limited to one hundred dollars ($100.00); that upon the termination of federal control February 29, 1920, the Transportation Act continued the government-made rates in force and effect until thereafter changed by state or federal authority or pursuant to authority of law, and that the government-made rates had not been changed by either state or federal authority or pursuant to authority of law and were [fol. 103] still in force as affecting intrastate movements in Missouri to and including the 3rd day of January, 1922, when the misdelivery of the trunk in question occurred.

Anticipating a ruling that the interstate or government-made rates no longer applied on intrastate shipments in Missouri at the time of this shipment; the answer further avers that under Revised Statutes of Missouri 10449, the liability is limited to one hundred fifty dollars ($150.00). We maintain that these defenses are wholly without merit, and were properly excluded by the trial court, for the reasons hereinafter pointed out.

Defendant does not set out in its abstract the testimony of plaintiff in reference to the value of the articles not delivered to her by defendant further than to state that there was such evidence in the record (Abs., p. 17).

As appellant makes no point that the verdict is excessive, we have not deemed it necessary to file a counter abstract in order to set out this evidence. We will say, however, that the uncontradicted evidence in the case proved that the goods undelivered had a value considerably in excess of the amount awarded by the jury.

[fol. 104] Propositions of Law

1

Contracts or tariff provisions limiting the liability of the carrier have no application to losses resulting from the carrier's affirmative

wrongful act, and a delivery of the goods to the wrong person is an affirmative wrongful act within the meaning of this rule.

4 R. C. L. 793;
Ann. Cas. 1913 D, p. 990, Note;
Clarke-Lawrence v. Chesapeake & Ohio Ry. Co., 61 S. E. (W. Va.), 364, l. c. 366;
Central of Georgia Ry. Co. v. Chicago Portrait Co., 49 S. E. (Ga.) 727, l. c. 728;
31 L. R. A. (n. s.) 309, Note.

2

No evidence was offered that at the time plaintiff's cause of action accrued, there was any tariff on file or in effect in Missouri limiting liability.

3

At the time plaintiff's cause of action accrued baggage rules published by the Director General were not in effect on intrastate movements in Missouri, and such transportation was subject to the laws of the State of Missouri.

In the matter of the application of common carriers for authority to put into effect increases in freight and passenger charges, 9 P. S. C. Reports 685;
Section 10449, R. S. Mo. 1919.

[fol. 105]

4

Baggage tariff 25-2 and supplement 2 are unlawful and void, because in violation of the statutes of the State of Missouri.

Section 10449, R. S. Mo. 1919.

5

Defendant having published no tariff naming a charge for the assumption of liability in excess of $150.00, it was liable to the plaintiff for the full value of the property lost.

Section 10449, R. S. Mo. 1919.

[fol. 106]

Argument

I

Contracts or tariff provisions limiting the liability of the carrier have no application to losses resulting from the carrier's affirmative wrongful act, and a delivery of the goods to the wrong person is an affirmative wrongful act within the meaning of this rule.

The second amended petition in this case places the right of action squarely in tort for the conversion of the plaintiff's trunk and the contents thereof. The admitted facts show that the defendant, without any justification or excuse, delivered the plaintiff's property to a

man having no right thereto, and without requiring the production and surrender of the check which had been issued to plaintiff at the time the trunk was received and checked at Jefferson City by the defendant. (See Stipulation, Abs., p. 13.) Such a misdelivery of the property is an affirmative wrongful act on the part of the carrier as against which it may not limit its liability by any special contract or tariff provision.

4 R. C. L. 793;
Ann. Cas. 1913-D, p. 990, Note;
Clark-Lawrence v. Chesapeake & Ohio Ry. Co., 61 S. E. (W. Va.) 364, l. c. 366;
Central of Georgia Ry. Co. v. Chicago Portrait Co., 49 S. E. (Ga.) 727, l. c. 728;
31 L. R. A. (n. s.) 309, Note.

[fol. 107] In 4 R. C. L. 793, the author states:

"A delivery of the goods to the wrong person is an affirmative wrongful act, and the usual stipulation limiting the carrier's liability does not affect the shipper's right to recover their full value."

The case of Clarke-Lawrence v. C. & O. Ry. Co., 61 S. E. 364, cited supra, is directly in point. In that case a carload of watermelons was shipped under a bill of lading containing, among other stipulations, a provision that in consideration of a reduced rate the liability of the carrier for loss or damage should be limited to one hundred dollars ($100.00). By a mistake on the part of the carrier's agent at destination the car was delivered to the wrong person; suit was brought for its value, and the carrier defended on the ground that in consideration of the reduced rate the liability had been limited to $100.00. The Court held that the provision for limitation of liability had no application to a misdelivery of the property, and permitted the plaintiff to recover its full value. In disposing of the defense of a limitation of liability, the Court said (l. c. 366):

"The stipulation for a limited liability has no application here. A wrongful delivery was not anticipated by the parties and cannot, therefore, be within the stipulation. Both the shipper and the carrier contemplated carriage of the goods to the place of destination, and delivery thereof to the consignee in good order and condition, provided they should not be lost or injured in transit by some accident or adventitious cause. As such loss or damage only was within the con-
[fol. 108] templation of the parties, the stipulation was clearly not intended to have any application in the case of a delivery to the wrong person. Affirmative wrongful acts are not within the limitation (Magnin v. Dinsmore, 70 N. Y. 410, 26 Am. Rep. 608; Chicago etc. Ry. Co. v. Fifth Nat. Bank, 26 Ind. App. 600, 59 N. E. 43; Hutch., Car., Sec. 478)."

The reasoning in the above quotation from the opinion of the Supreme Court of West Virginia applies directly to the facts of this case. These tariff provisions are intended only as a protection to the

carrier in the event of loss or damage due to accident in transportation. The tariff rule offered in evidence in this case (Abs., p. 21) expressly limits its application to cases of loss or damage as follows:

"And the carriers issuing and participating in this tariff will not accept claim for a greater sum, in case of loss or damage."

This rule does not say that claim will not be accepted in the event of conversion, embezzlement, misdelivery or other wrongful act or misconduct on the carrier's part, but only limits the liability in the event of loss in transit or damage in transit, and it was plainly the intention of the publishers of the rule to limit their liability only in the event of accident happening in the transportation of the goods. It was not intended by this tariff provision that there should be any limitation upon the carrier's liability in the event of its affirmative wrongdoing, and to so hold would permit a carrier to intentionally steal shipments of great value, and by invoking the provision limiting [fol. 109] liability thereby profit by its own wrong. There is no such intention expressed in the tariff rule, and if such an intention were expressed therein, it would be contrary to public policy and void.

In Central of Georgia Railway Company v. Chicago Portrait Co., 49 S. E. 727, the Supreme Court of Georgia, in holding that a carrier cannot limit its liability for its own wrong, said (l. c. 728):

"In an action of trover or damages for conversion the tort-feasor could not take advantage of his own wrong, nor lessen the measure of his liability by invoking an agreed valuation which the plaintiff may have made for the purpose of reducing the freight rate or securing like collateral advantage."

Assuming, therefore, for argument only, that the tariffs offered in evidence in this case were lawfully in effect and applied to intrastate movements in Missouri, which we deny, we submit for the above reasons and on the authority of the cases above cited, that these tariff rules had no application to the facts of this case, wherein it appeared that by the wrongful act of the carrier plaintiff's property was converted and turned over to a stranger having no right or title thereto.

The cases cited in defendant's brief have no bearing on this case, they are based on interstate shipments, and are all actions to recover losses due to accident or negligence in transportation. None of the cases cited in defendant's brief relate to conversion, misdelivery or other affirmative wrongful acts on the carrier's part.

[fol. 110]

II

There is no evidence that at the time of the conversion of plaintiff's trunk there was any tariff on file or in effect in Missouri limiting liability.

Plaintiff's cause of action accrued on January 3, 1922, nearly two years after the termination of federal control. The only tariffs offered in evidence by defendant are the following:

First. Rules 10 and 11 of baggage tariff No. 25-2, filed with the Interstate Commerce Commission by the Director General October 1, 1919. Rule 10 provided that 150 pounds of baggage not exceeding $100.00 in value might be checked without additional charge (Abs., p. 20). Rule 11 provided that unless a greater sum is declared by the passenger, and charges paid therefor, that the value shall be agreed to be not in excess of the amount specified in rule 10.

Second. Supplement No. 2 to tariff 25-2, filed with the Interstate Commerce Commission by the Director General February 29, 1920, containing rules 10 and 11 in substantially the same language.

Third. The decision and order of the Public Service Commission of Missouri in case No. 2492, 9 P. S. C. Rep. 685.

Fourth. Supplement No. 6 canceling baggage tariff No. 25-2 filed with P. S. C. Mo. March 1, 1922. (The provisions of this supplement were not offered in evidence, and it was filed two months after plaintiff's cause of action accrued.)

The foregoing was all the evidence offered by defendant in support of its defense that there was a limitation of liability, and we [fol. 111] respectfully submit that neither of these documents, nor all of them taken together, afford any proof whatever that at the time the plaintiff's trunk was converted there was any tariff provision in Missouri limiting liability for loss or damage to baggage transported between points in Missouri.

In the first place, there is no evidence that tariffs No. 25-2 or Supplement No. 2 thereto, filed by the Director General with the Interstate Commerce Commission in Washington, applied over the Missouri Pacific Railroad or between any points in Missouri. Before a tariff can be effective it must be shown to apply to the traffic in question. Every tariff shows on its face over what lines of railroad it applies and between what points it applies and to what character of traffic it applies. Those portions of these tariffs were not offered in evidence, and there is nothing in this record from which the Court can determine over what railroads in the United States or between what points rules 10 and 11 in tariffs 25-2 and Supplement No. 2 thereto apply. The Director General published thousands of baggage tariffs applying over different roads and in different parts of the United States. These tariffs are simply described by defendant's counsel as tariff No. 25-2 and Supplement 2 thereto (Abs., pp. 19 and 22). But no evidence what ever was introduced to show that these two tariffs were ever published to apply between Jefferson City and Sedalia in Missouri.

Nor does the decision of the Public Service Commission of Missouri afford any evidence that these two tariffs applied to Missouri [fol. 112] traffic, or that they were ever filed with the Public Service Commission in Missouri. Your Honors will find this opinion and order of the Commission published in the reports of the Public Service Commission of Missouri, Vol. 9, pages 685 to 696. The decision merely holds that the carriers are entitled to put in effect

increases in freight and passenger charges. The order authorizes the carriers to file with the Public Service Commission prior to September 1, 1920, tariffs containing rates promulgated by the Director General of Railroads during federal control, and provides that those rates shall remain in effect for a period of six months from September 1, 1920. There is nothing in this opinion or in this order which shows that acting under that authority the defendant, Missouri Pacific Railroad Company, in fact, published a baggage tariff limiting its liability, and if this defendant ever published such a tariff this record fails to show it.

Under the Public Service Commission Law, Secs. 10438-10444, tariff rates, charges, rules or regulations, in order to be effective on intrastate shipments in Missouri, must be filed with the Public Service Commission of Missouri, and there is no evidence that Baggage Tariff No. 25-2 or Supplement 2 was ever filed with the Public Service Commission of Missouri. The most defendant proved was authority to file same, but it never proved, nor offered to prove, the fact that same was filed.

For the purpose of proving that Tariff 25-2 was in effect in Missouri at the time plaintiff's cause of action accrued, January 3, 1922, defendant offered in evidence a document entitled "Western Pas-[fol. 113] senger Bureau, Missouri Supplement No. 6, Canceling Baggage Tariff No. 25-2, Effective March 1, 1922," which counsel stated (Abs., p. 33) was filed with the Public Service Commission of Missouri. This document filed March 1, 1922, does not prove that Tariff 25-2 was in effect in Missouri, January 3, 1922. The fact that a tariff is filed purporting to cancel a former tariff is no evidence that the former tariff was ever in effect. The way to have proved that 25-2 was in effect, if it ever was, would have been to offer the tariff, but for reasons best known to themselves, defendant's counsel did not care to put their Missouri tariffs in evidence in this case. We submit that you cannot prove that a tariff was in effect in January by showing that you canceled that tariff in March.

Further, there is no evidence that this Supplement No. 6 was ever filed except counsel's unsworn statement (Abs., p. 33). The portion of this Supplement No. 6 read in evidence does not show the filing, nor the filing number, nor the date of filing.

We, therefore, deny the statement on page 41 of defendant's brief that this Supplement No. 6 filed in March proves that Rules 10 and 11 of Tariff 25-2 were in effect in January. We say Supplement No. 6 is no evidence whatever of such fact, first, because Supplement No. 6 was not shown by competent evidence to have been filed with the Public Service Commission of Missouri, and, second, because if filed, and if it did cancel Tariff 25-2 on that date, to wit, March 1, 1922, it is no proof that Tariff 25-2 had been in effect two months prior thereto. So far as this record shows, Tariff 25-2 might have been filed one day and canceled the next. If Tariff 25-2 was in [fol. 114] effect on January 3, 1923, it could have been easily so proved by the records of the Public Service Commission of Missouri, and there was absolutely no such proof offered in this case.

We say, therefore, that the defendant wholly failed to prove its case, and has offered no evidence whatever, either that the Director General ever published any baggage tariff for application in Missouri, or that the carriers ever published any tariff with the Missouri Commission, limiting liability for baggage lost in transit.

III

At the time of the conversion of plaintiff's trunk, baggage rules published by the Director General were not in effect on intrastate movements in Missouri, and such transportation was subject to the laws of the State of Missouri.

While what has been said above is sufficient to dispose of this appeal, yet we contend further that even if tariff rules limiting liability could be held to apply to goods converted by the carrier, and even if it could be said that substantial evidence was offered of the publication of such a limitation upon intrastate shipments in Missouri, yet we further contend that at the time plaintiff's cause of action accrued federal control had ended, Government-made rates were no longer effective in Missouri, and that transportation between points in Missouri was subject to the laws of the State of Missouri and the rulings of the Public Service Commission.

In support of its argument that the interstate rates published by [fol. 115] the Director General during federal control were in effect in Missouri at the time plaintiff's cause of action accrued, defendant quotes Section 208–A of the Transportation Act of February 29, 1920, which provides that all rates and regulations in effect on February 29, 1920, shall "continue in force and effect until thereafter changed by state or federal authority, respectively, or pursuant to authority of law," but no rate shall be reduced prior to September 1st, 1920.

It appears affirmatively, however, from the defendant's own evidence that long prior to January, 1922, the Government-made rates had been changed by authority of law to state-made rates, and that the rates made by the Director General were no longer in effect in Missouri.

Federal control terminated on February 29, 1920. Thereafter the defendant and other railroads in Missouri applied to the Public Service Commission of Missouri for authority to file with the Public Service Commission of Missouri rates and regulations to apply on intrastate traffic in Missouri, and after full hearing the Commission, in the opinion and order offered in evidence by defendant in this case (9 P. S. C. Rep. 685), granted that authority.

We submit that the order of the Public Service Commission assuming jurisdiction over the matter of rate making in Missouri was "state authority" and "authority at law," which had the effect of changing the rates and regulations from those named by the Director General to those named by the Public Service Commission of Missouri. The fact that the rules and regulations thus permitted to be filed for a period of six months by the Public Service Commis-

[fol. 116] sion of Missouri were the same rules and regulations as had been promulgated by the Director General is immaterial. The point is that the tariffs so filed or permitted to be filed were filed under state authority and not under federal authority, and the validity of the tariff filed must be determined by the laws of the State of Missouri.

Further, upon the termination of federal control the power of Congress over intrastate rates terminated and state laws and statutes, which had been suspended, again became effective, except that no rate could be reduced prior to September 1, 1920. Certainly, after September 1, 1920, all of the statutes of Missouri affecting railroads became again operative as to intrastate transportation. Section 10449, R. S. Mo. 1919, covers the subject of limitation for liability for loss of baggage in Missouri, and since September 1, 1920, the matter of such limitation of liability in respect to shipments between points in the State of Missouri has been governed by that statute, and not by tariffs published by the Director General during the period of federal control.

Further, the provision "pursuant to authority of law" in the Transportation Act means pursuant to state statutes, state laws being clearly "authority of law." Therefore, after the limitation of federal control, the effect of Sec. 10449, R. S. Mo. 1919, was to nullify baggage tariffs of the Director General inconsistent therewith and to subject the matter of limiting liability on Missouri shipments to the provisions of this statute.

[fol. 117] IV

Baggage Tariff No. 25–2 and Supplement 2, alleged to be applicable to the shipment of plaintiff's trunk, is unlawful and void, because in violation of the statutes of the State of Missouri.

Section 10449, R. S. Mo. 1919 (Section 40 of the Public Service Commission Law) declares that no contract or stipulation shall exempt a common carrier from liability for loss or damage to property in Missouri; that every such carrier shall be liable for all losses caused by its negligence, and that the burden is on the carrier to show that the loss was not due to its negligence; that every such carrier shall be liable up to the full value of the property lost, but the value in excess of $150.00 shall be stated, " and written receipt stating the value shall be issued by the carrier," and the carrier "may make a reasonable charge for the assumption of such liability in excess of $150.00," and provides, further, that nothing in this section shall deprive the claimant of any remedy he may have under existing law.

Tariff 25–2 and Supplement 2 are in direct conflict with section 10449 in that it undertakes to limit the carrier's liability to $100.00, a sum less than the amount stated in the statute, and attempts to make a charge for excess liability in excess of the charge permitted by the statute, in that the statute only permits a charge for assuming liability in excess of $150.00, whereas this tariff undertakes to make a charge for assuming liability in excess of $100.00. Therefore we

say that the tariff is plainly void because in conflict with the statutes of this state.

[fol. 118] Nor does the fact that this tariff may have been approved by the Public Service Commission of Missouri, or that authority to file same may have been granted by the Public Service Commission of Missouri (9 P. S. C. Rep. 685), make the tariff a lawful one. The Public Service Commission of Missouri is created by the Public Service Commission law. It has such powers and such only as are provided in that enactment. Section 40 of that act (R. S. Mo. 10449) limits its powers with reference to permitting tariffs to be filed limiting the carrier's liability for lost property to a minimum of $150.00. Therefore the Commission had no power to approve tariff rules limiting or attempting to limit the liability to $100.00, and if there is anything in the Commission's report, 9 P. S. C. Rep. 685, which authorizes the filing of tariff 25-2 in Missouri, it is plainly in excess of the Commission's authority and void. Defendant practically concedes this point in the last paragraph of page 41 of its brief, wherein it suggests that the Public Service Commission would have no authority to permit the filing of a tariff in conflict with the state statute. Especially is this true where such statute is itself one of the sections of the Public Service Commission Law.

V

Under Section 10449, R. S. Mo. 1919, the defendant was liable to the plaintiff for the full value of the property lost.

As above pointed out, Sec. 10449 provides that every common car-[fol. 119] rier in Missouri shall be liable for the full value of baggage lost except that it "may make a reasonable charge for the assumption of such liability in excess of $150.00." It is plain, therefore, that unless it publishes a charge for the assumption of liability in excess of $150.00, the carrier is liable for the full value of the goods. In this case the defendant has published no such charge. The only tariff that it claims to have published is 25-2, which we submit is void for the reasons above stated, and therefore it appears from this record that at the time plaintiff's cause of action accrued there was no tariff published in Missouri limiting the liability to $150.00 or making a charge for the assumption of liability in excess thereof. It is true that under this statute defendant might have published a tariff requiring value in excess of $150.00 to be declared and making a charge for assuming liability therefor, but it has not done so and no such tariff is on file. Therefore, the provisions of Section 10449, making the carrier liable for the full value of the goods, applied to this case, and plaintiff was entitled to recover the full value of the baggage lost.

Further as a condition to its right to limit its liability to $150.00, Section 10449 requires that "a written receipt stating the value shall be issued by the carrier." No such receipt was issued to the plaintiff in this case. The only receipt issued to her was the check given to her by the baggage agent at Jefferson City. That check was offered

in evidence (Plaintiff's Ex. B, Abs., p. 15), and it nowhere states the value of the property.

Therefore, we say that because the defendant failed to publish a [fol. 120] charge for the assumption of liability in excess of $150.00, and because it failed to issue a receipt to plaintiff stating the value of the goods, that the provisions of Section 10449 permitting a limitation of liability do not apply, and that the case falls under the other provisions of Section 10449 which make the defendant liable for the full value of the goods.

It is somewhat difficult to follow defendant's argument that under this statute its liability should be limited to $150.00 because the plaintiff did not declare a greater value, and pay a charge for the assumption of the greater liability, when it appears affirmatively that they published no such charge, and that had the plaintiff declared a value in excess of $150.00 there was no tariff on file under which a charge for the excess value could have been made. Suppose plaintiff had declared the contents of the trunk to be worth $1,000.00 or $2,000.00, the defendant would have had to take it for transportation, and there was no tariff on file under which it could have made a charge for the excess value, and plaintiff could not have been reqiured to pay one cent more than the regular price of her ticket which she paid in this case.

In conclusion we submit that the uncontradicted evidence in this case shows that the plaintiff's trunk was converted and wrongfully delivered to a stranger, and that, therefore, tariff rules limiting liability have no application. We further submit for the reasons hereinbefore set out that no proof was offered that Tariff 25-2, published by the Director General, was ever in effect in Missouri at the time this [fols. 121 & 122] cause of action accrued; and we further submit that so far as this record shows, defendant failed to limit its liability to $150.00 under the provisions of the Missouri statute. Therefore, the trial court properly permitted the plaintiff to recover the full value of the articles lost. It is not claimed that there was any error in the procedure, and we ask that the judgment be affirmed.

Respectfully submitted, Thomas Bond, Theodore Rassieur, Attorneys for Respondent.

[fol. 123] IN ST. LOUIS COURT OF APPEALS

[Title omitted]

APPELLANT'S REPLY BRIEF—Filed March 31, 1924

Certain incorrect statements of fact, as well as the fallacy of respondent's theory of her right to recover in this case, warrant some further discussion, we think, of the issues and the law applicable thereto.

On page 3 of respondent's brief the following statement appears: "The liability is admitted."

[fol. 124] The source of counsel's misapprehension in this respect is not disclosed, but it is not to be found in this record.

By its answer appellant admitted that respondent was a passenger upon its train from Jefferson City to Sedalia and then "denied each and every other allegation" in the petition.

The answer set up certain defenses—valid defenses, we contend, by reason of which appellant raised the issue that "if entitled to recover at all herein," respondent was not entitled to recover any greater amount than $100.00 or $150.00 (Abs., pp. 5-8).

Nowhere in the record of the proceedings during the trial will any admission of liability by appellant be found. On the contrary, appellant offered a demurrer to the evidence at the close of respondent's case and again at the close of all the evidence, even though the only evidence which appellant succeeded in prevailing upon the trial court to admit was respondent's baggage check.

Again, appellant assigns as error in this court that the trial court erred in refusing the demurrers to the evidence offered by it and the defense here is not, as stated by counsel, that "this admitted liability" should be limited to the sum of $100.00.

By its answer, by its conduct in the trial court, and by its assignment of errors in this court, appellant's defense is:

First. That there is a failure of proof of either negligence or other misconduct on the part of appellant entitling respondent to recover any sum, and,

Second. That if she is entitled to recover at all, the amount of her [fol. 125] recovery should not exceed either $100.00 or $150.00.

The first contention advanced by respondent is as follows:

"Contracts or tariff provisions limiting the liability of the carrier have no application to losses resulting from the carrier's affirmative wrongful act, and a delivery of the goods to the wrong person is an affirmative wrongful act within the meaning of this rule."

Not a single case or authority cited by counsel in support of this proposition had even a remote connection with a tariff provision. The two decisions cited involved contract provisions and shipments made upon the issuance of bills of lading containing such contract provisions. Neither these decisions nor the other authorities cited either involved or referred to the limitation of liability by tariff provision. Moreover, the "affirmative wrongful act" referred to in these authorities consisted of a delivery of freight by the carriers to parties other than those named in the bills of lading without even requiring the production by those parties of the bills of lading.

In the case of Railway Co. v. Portrait Co., 49 S. E. 727, the plaintiff brought suit against the railway company, alleging that it delivered to the railway company in Chicago five boxes of nonperishable merchandise to be transported by the defendant and its connecting carriers to Albany, Ga.; that said merchandise was delivered [fol. 126] to the defendant company and by it transported to its destination in good order, and that the defendant converted the same

by causing it to be shipped to Savannah, Ga., as unclaimed freight and there sold at public outcry within less than six months after the same had arrived at destination.

The opinion does not set out any further facts or reasons for the shipment by the defendant from destination of the freight to Savannah, Ga.

The defense was that the railway company had the right to limit its liability not because of any law, either statutory or common law, or by virtue of any tariff regulations, but because of the terms of the contract of shipment. It was further contended by the railroad company that the rights and liability of the parties under such contract were to be determined by the laws of Illinois and that, under the laws of that state, as applied to said contract, if the plaintiff was entitled to recover at all, it was entitled to recover only $5.00 for every hundred pounds of freight.

The Court merely held that the shipment of the goods from destination to another point under the circumstances existing in that case—whatever those undisclosed circumstances were—amounted to a conversion after the contract of carriage was completed and that, in an action for damages for such conversion the defendant could not take advantage of its own wrong "nor lessen the measure of his liability by invoking an agreed valuation which the plaintiff may have made for the purpose of reducing the freight rate or securing like collateral advantage."

[fol. 127] In the case of Clark Lawrence Co. v. Railway Co., 61 S. E., 364, the defendant wrongfully delivered a car of melons while in transit to another party than the consignee without any surrender of the bill of lading or without requiring the presentation of any evidence that the one to whom the car was delivered was the consignee or was entitled to it. The shipper had obtained a reduced rate for the shipment in consideration of which a bill of lading was signed containing a stipulation limiting the liability of the company to $100.00 for all loss or damage that might occur to the melons from any cause, and the defense was interposed that, as the shipment had been made under a contract limiting liability, certain damages claimed by the plaintiff could not be recovered. It was upon such a set of facts that the Court said:

"A wrongful delivery by a common carrier amounts in law to a conversion. It is not a mere withholding of possession, which cannot be treated as a conversion until after demand made. The carrier had not only refused delivery to the consignee, but parted with the possession of the property as well. Under such circumstances no demand is necessary. The breach of the contract was complete without it."

Again in that case the Court said:

"The stipulation for a limited liability has no application here. A wrongful delivery was not anticipated by the parties and cannot therefore be within the stipulation."

[fol. 128] Each of these cases involved an effort by the carrier to limit its liability as to amount by a contract stipulation and neither of the cases is authority for any question involved in this case.

Again, no case or other authority has been cited by respondent as to the effect of delivery of baggage to another person than the owner upon the presentation by the former of a check therefor.

Counsel for respondent have seized upon the fact of a delivery of respondent's trunk by appellant to another person upon which to base the ingenious contention that such a delivery amounted to a conversion, rendering appellant liable for the full value of the trunk and contents. But in discussing this contention, either purposely or inadvertently, counsel misstate the facts which were stipulated. They say:

"The admitted facts show that the defendant, without any justification or excuse, delivered the plaintiff's property to a man having no right thereto, and without requiring the production and surrender of the check which had been issued to plaintiff at the time the trunk was received and checked at Jefferson City by defendant."

And it is argued that such a misdelivery of the property is an affirmative wrongful act.

With respect to the alleged misdelivery of respondent's trunk, the facts were stipulated to be as follows:

"That the trunk referred to in plaintiff's second amended petition was on, to wit, January 3, 1922, delivered to defendant's agent at Jefferson City, Missouri, and was by him checked for trans-[fol. 129] portation over defendant's railroad to Sedalia, Missouri; that said trunk reached Sedalia, Missouri, and was received by defendant's agent at Sedalia, Missouri, on the evening of January 3, 1922; that shortly after the arrival of said trunk at Sedalia, Missouri, while said trunk was in defendant's baggage room, in its station at Sedalia, Missouri, one John H. Clark removed the check which had been attached to said trunk at Jefferson City, Missouri, and substituted and attached to said trunk another check in lieu thereof, the duplicate of which latter check was in the possession of said John H. Clark, and that at some time during the night of January 3, 1922, or early morning of January 4, 1922, said trunk and contents were delivered by defendant's agent at Sedalia to a local drayman, acting as the agent of said John H. Clark, upon the presentation by said local drayman of the duplicate check above referred to, which duplicate check had theretofore been in the possession of the said John H. Clark, and that the said John H. Clark then caused said trunk to be shipped out of Sedalia by way of another railroad."

We submit that these facts afford no basis for the statement that, "defendant, without any justification or excuse, delivered the plaintiff's property to a man having no right thereto."

Again, counsel say, "It is the defendant's duty to know its own baggage check." But that is only counsel's conception of appellant's duty; no authority is cited that so holds.

Again, there is no evidence that the check, or checks, by the use of which Clark obtained this baggage, were not appellant's checks. [fol. 130] Regardless of appellant's duty to know its own baggage checks, no Court and no authority has yet gone so far as to hold that appellant should know that the man who presented the check corresponding with the one on the trunk was not the rightful owner thereof.

We submit that there was no conversion, in the ordinary meaning of that term, in this case, and the evidence wholly fails to establish that there was. The authorities all are to the effect that there are two kinds of conversion, one of which is accomplished by a person appropriating the property of another to his own use; the other of which arises by reason of the act of the person in delivering the property of another to a third person. The authorities further hold that before a case of conversion falling within the latter clause can be established there must be proof of an intent of the alleged wrongdoer to convert the property.

In 26 Ruling Case Law, page 1111, Section 21, the rule is stated as follows:

"The question as to whether or not, in an action of trover, the plaintiff must prove an intention on the part of the defendant to convert the property to his own use is one which is not free from difficulty. According to Lord Mansfield, 'a mere wrongful asportation of a chattel does not amount to a conversion unless the taking or detention of the chattel is with intent to convert it to the taker's own use, or that of some third person, or unless the act done has the effect of destroying or changing the quality of the chattel.' As a logical deduction from this doctrine it would clearly seem that the defendant, in order to be guilty of conversion, must have [fol. 131] converted the property to his own use; and if not, then any other act to amount to conversion, must be done with a wrongful intent, either express or implied. In other words, the intent of the defendant should be taken into consideration when his act is otherwise equivocal."

In this case appellant did not appropriate respondent's trunk, or contents, to its own use. The alleged conversion is claimed to have consisted of appellant's delivery of the trunk to a third person, to wit, Clark, but there is a total failure of proof of any intention on the part of appellant to thereby work a conversion of the trunk and contents. There is no evidence in this record either of negligence or wrongful intent on the part of appellant with respect to this transaction.

In this case appellant contends that its liability is limited because of the provision of certain tariffs. One of those provisions is as follows:

"Unless a greater sum is declared by a passenger and charges paid for excess value at time of delivery to carrier, the value of property belonging to or checked for a passenger shall be deemed and agreed to be not in excess of the amount specified in rules 5, 6 and 10, and

the carriers issuing and participating in this tariff will not accept a claim for a greater sum in case of loss or damage" (Abs., p. 21).

The tariff further provides as follows:

"If passenger declares according to the form prescribed by checking carrier a greater value than specified in the rules mentioned in the [fol. 132] preceding paragraph, there will be an additional charge at the rate of 10 cents for each one hundred dollars ($100.00) or fraction thereof above such agreed maximum value."

This tariff is binding upon both of the parties to this suit, and in view of the language of these provisions it makes no difference how the loss or damage to the baggage was caused. The liability is not limited in the event only of damage to baggage, but it applies as well in case of loss of same. The failure to declare a greater sum and the failure to pay charges for such excess value—not the manner of loss or damage—determine the amount of liability. When respondent checked this trunk, as she admits she did, without declaring any greater value and without paying or offering to pay an additional charge for its transportation, right then and there she agreed that its value was not in excess of $100.00. Her conduct determined the value of the trunk and contents, and appellant is precluded, by the provisions of this tariff, from accepting claim for any greater sum than $100.00.

There is nothing in the tariff which provides that the liability shall be for $100.00 in the event of loss or damage by negligence—by an act of omission—and that it shall be for the full value if lost or damaged by reason of some affirmative act on the part of appellant. We repeat that the cause or manner of the loss under this tariff has no bearing whatever upon the amount of liability.

The next contention of respondent is as follows:

"No evidence was offered that, at the time plaintiff's cause of action [fol. 133] accrued, there was any tariff on file or in effect in Missouri limiting liability."

In connection with this contention we remind the Court that appellant's case was somewhat stripped by the trial court. None of the evidence offered by appellant was admitted except respondent's baggage check, which was identified by her, but not offered by her counsel. But, if counsel for respondent will reread the abstract of the record they will not fail to observe, first, that certain tariffs containing the baggage regulation upon which appellant relies were filed by the Director General of Railroads during the period of federal control with the Interstate Commerce Commission. That fact is material by way of identification and reference. Subsequent to the period of federal control certain carriers in Missouri petitioned the Public Service Commission of Missouri for authority and were authorized to put in effect in Missouri the same tariffs which were filed by the Director General during federal control. The order of the Public Service Com-

mission plainly shows that the applicants, one of whom was appellant (Abs., p. 32), were authorized to file with the Public Service Commission prior to September 1, 1920, "tariffs containing rates promulgated by the Director General of Railroads between June 10, 1918, and February 29, 1920, as effective at midnight of February 29, 1920." It was further ordered that there "shall be filed with said tariffs as above authorized all current supplements that were in effect at midnight of February 29, 1920."

It was further ordered that the increases thereby authorized should [fol. 134] be effective for a period of six months from and after September 1, 1920, at which time said rates shall be restored to the basis of rates in effect February 29, 1920, unless the Commission shall extend the period of effectiveness or change the rates herein prescribed (Abs., pp. 31-32).

By paragraph 17 of this order of the Public Service Commission of Missouri it was expressly provided that the term "applicants" as used therein "shall be construed as referring to the following named carriers." Then follows the name of appellant as one of said applicants.

The baggage tariff which was filed by the Director General during the period of Federal Control and which was authorized and refiled with the Public Service Commission of Missouri, was known as "Baggage Tariff No. 25-2" (Abs., p. 20).

Appellant then offered in evidence Western Passenger Bureau Missouri Supplement No. 6, canceling Baggage Tariff No. 25-2, effective March 1, 1922.

All of this evidence, if admitted, would have established:

First. That during the period of Federal Control the Director General of Railroads filed Baggage Tariff No. 25-2 with the Interstate Commerce Commission, in which appellant was authorized and required to limit his liability to $100.00 in the event of loss or damage to baggage, unless a greater value was declared at the time the baggage was delivered to it for transportation and an excess rate paid therefor.

[fol. 135] Second. That appellant was authorized by the Public Service Commission of Missouri to continue, and did continue, all of the provisions of said Baggage Tariff 25-2 in full force and effect in the State of Missouri until March 1, 1922, or until three months after the loss of respondent's baggage.

This answers the third contention of respondent to the effect that the baggage rules published by the Director General were not in effect on intrastate movements at the time plaintiff's cause of action accrued.

Again, counsel for respondent said that there is no evidence that the tariffs in Baggage Tariff No. 2 applied "over the Missouri Pacific Railroad, or between any points in Missouri." The tariff (Baggage Tariff No. 25-2, offered by appellant), as counsel knows if he examined it at the time it was offered, plainly showed that it applied to appellant. When this offer was made counsel for respondent objected to it, but nowhere in that objection (Abs., pp. 19-20) was it contended that the tariff did not apply to appellant.

In conclusion, we repeat, as we argued in our original brief, that

the Public Service Commission of Missouri authorized appellant by the order set out in the abstract to limit its liability for loss or damage to baggage to $100.00, and the only effect of the statute of this state, upon which respondent relies, is to preclude the Commission from authorizing a limitation of liability to a smaller sum than $150.00. [fol. 136] The most that can be said of the effect of that statute is that it prevented the Commission from authorizing the limitation of liability to any amount below the sum of $150.00.

Respectfully submitted, James F. Green, M. U. Hayden, Attorneys for Appellant.

[fol. 137] IN ST. LOUIS COURT OF APPEALS

[Title omitted]

ARGUMENT AND SUBMISSION—Tuesday, April 1st, 1924

Now at this day come the said parties, by their respective attorneys, and after argument herein, submit this cause to the Court.

[fol. 138] IN ST. LOUIS COURT OF APPEALS

[Title omitted]

JUDGMENT—Filed June 6, 1924

Now again come the parties aforesaid by their respective attorneys and the court being now sufficiently advised of and concerning the premises, doth consider and adjudge that the judgment rendered herein by the said Circuit Court of the City of St. Louis be affirmed and stand in full force and effect; and that said respondent recover of said appellant the costs of this appeal and have execution therefor. Opinion filed.

And said opinion of the Court is in words and figures as follows, to-wit:

[fol. 139] IN ST. LOUIS COURT OF APPEALS

[Title omitted]

OPINION—Filed June 6, 1924

Plaintiff brought this action against defendant to recover for the loss of the contents of a trunk which defendant undertook to carry as baggage for plaintiff from Jefferson City, Missouri, to Sedalia, Missouri. Plaintiff alleges that defendant, in disregard of its duty, wrongfully delivered the trunk and its contents to one John H.

Clark, and did not deliver it to plaintiff for more than a month thereafter, and that when it was delivered it was in a broken and damaged condition, with certain articles of wearing apparel missing of the reasonable value of $1,398.

Plaintiff recovered judgment for $1,000 with interest, and defendant appeals.

The answer to plaintiff's petition set up as a defense that, under and by virtue of the provisions of an order of the Director General of Railroads, and certain rules and tariffs promulgated in accord- [fol. 140] ance with the Interstate Commerce Act and the Federal Control Act, it was not liable for more than $100, because defendant, at the time she became a passenger, did not pay any excess value, and that such rules and tariffs governing the transportation of baggage over this line of railroad between Jefferson City, Missouri, and Sedalia, Missouri, were in force and effect at the time plaintiff suffered the loss. In other words, the answer sets up all averments sufficient to bring it within the provisions of the tariff rates and regulations on file with the Interstate Commerce Commission and the Public Service Commission of Missouri. Defendant contends further that, in any event, section 10499, R. S. Mo. 1919 limited its liability to a sum not to exceed $150.

Plaintiff, on the third day of January, 1922, purchased a ticket from Jefferson City, Missouri to Sedalia, Missouri, over defendant's line of railroad, and delivered to defendant's agent at Jefferson City, her trunk, containing certain wearing apparel, to be transported over defendant's railroad to Sedalia, Missouri. The trunk was checked at Jefferson City and duly transported to Sedalia, and was received by defendant's agent at Sedalia on the same day and placed in defendant's baggage room in its station at Sedalia. While the trunk was in this baggage room, one John H. Clark removed the check which had been attached to the trunk at Jefferson City and substituted another, the duplicate of which latter check Clark kept in his possession. Some time during the night of January 3rd, or early morning of January 4, 1922, this trunk was delivered by defendant's agent at Sedalia, Missouri, to a local drayman acting as the agent of John H. Clark, when said drayman presented the dupli- cate of the check held by Clark and which had been in the posses- [fol. 141] sion of Clark. Clark then caused the trunk to be shipped out of Sedalia by way of another railroad. About a month later the trunk was recovered and returned to plaintiff minus the contents above referred to. Plaintiff never surrendered the check she held, but when she presented it at Sedalia for the purpose of obtaining her trunk she was first informed that it had not arrived, and then later told that it had been stolen. Plaintiff did not know John H. Clark, and had never authorized any one to deliver the trunk to him, and had no knowledge that it had been so delivered until she was informed by defendant's agent at Sedalia. Plaintiff had no conversation with the agent at Jefferson City where she purchased the ticket, and made no declaration of value on the trunk or its contents.

The defendant offered in evidence certain baggage tariffs purporting to have been filed with the Interstate Commerce Commission by the Director General of Railroads, and a certain decision of the Public Service Commission as well as certain orders of said commission relative to railroad rates in Missouri. The court sustained objections to all these offers of testimony made by the defendant for the purpose of fixing its liability at $100 under the provisions of the Interstate Commerce Act.

After defendant's demurrers offered at the close of the plaintiff's case and at the close of the whole case were overruled, the case was given to the jury permitting a recovery for the fair and reasonable value of the articles missing from plaintiff's trunk when it was returned to her, together with six per cent interest. After verdict and [fol. 142] judgment for plaintiff as aforesaid, and the overruling of defendant's motion for new trial, the case was appealed to this court.

It is contended by defendant that, under the provisions of the tariffs and regulations governing the transportation of baggage, and limiting liability for loss to a certain amount unless greater value is declared, the court erred in not admitting this testimony, for if such had been admitted it would have shown conclusively that defendant was liable for only $100. We are of the opinion, however, that if the testimony offered by defendant had been admitted it would not be relieved from liability to the extent claimed, under the conceded facts in this case, because as a part of the evidence adduced in behalf of plaintiff it was stipulated and agreed by the parties to this cause that, shortly after the arrival of the trunk at Sedalia, and while it was in defendant's possession, they delivered it to one John H. Clark, who was not the owner, and one to whom the defendant had no right or authority to deliver except by virtue of this duplicate check which Clark had in some way obtained. A misdelivery, or the delivery to a wrong person, by a carrier of an article intrusted to it to be carried, is a conversion; and this is true even though the carrier offered to and did return the trunk after it had been recovered minus the contents. (Marshall & Michel Grain Co. v. K. C., Ft. S. and M. R. Co., 176 Mo. 480, 75 S. W. 638.) In such a situation the conversion prevents defendant from invoking the provisions of the contract of shipment or tariff provisions limiting its liability. Upon a conversion, the law creates a new relation between the parties in that the carrier is deemed to have abandoned the contract of shipment. Because of the tort the [fol. 143] carrier cannot insist upon a stipulation that his liability was to be limited to a certain sum. (People's State Sav. Bank v. Railroad, 192 Mo. App. 614, 178 S. W. 292.)

In 10 C. J., pp. 183 and 184, sec. 236, it is stated:

"Limitations of the carriers' common-law liability contained in a contract of shipment have no application where the goods are delivered to the wrong person."

In 10 C. J. pp. 262 and 263, sec. 377, it is further said:

"If the carrier delivers goods to a person not entitled to receive them it is liable to the person who is entitled to them for conversion, rendering it immediately liable, regardless of a subsequent destruction of the goods by the act of God, and irrespective of its good faith in making the delivery. No question of care arises, for in such case the carrier acts at its peril and is liable regardless of negligence."

A carrier cannot be guilty of conversion, which in law amounts to an abandonment of the contract, and at the same time hold the shipper to the terms of a contract which it has repudiated. We can not construe the provision of the shipping contract fixing the liability of the carrier based upon a stated value, to extend to a case of conversion such as this. (St. Louis, etc. R. C. v. Wallace (Tex. Civ. App.), 176 S. W. 764; Merchants', etc. Transportation Co. v. Moore, 124 Ga. 482; Clarke-Lawrence v. C. & O. Ry. Co., 61 S. W. (W. Va.) 364; 4 R. C. L. 793.)

[fols. 144 & 145] Learned counsel for defendant insists that the case of Shannon v. Hines, 205 Mo. App. 629, 226 S. W. 283, and certain decisions of the Supreme Court of the United States, hold that plaintiff cannot sue in trover as for conversion and recover more than the stated value. But these cases refer to interstate shipments, and were goverened by federal laws. The shipment in the instant case was an intrastate shipment, and is governed by the laws of Missouri. Section 10449, R. S. 1919, makes defendant liable for the full value of the property lost, and under the Missouri authorities above cited, this being an intrastate shipment and defendant guilty of conversion, the defendant would be liable for the full value. See Bowles v. Payne (Mo. App.), 251 S. W. 101.

Therefore, the judgment of the circuit court should be affirmed.

S. G. Nipper, Commissioner.

Per CURIAM:

The foregoing opinion of Nipper, C., is adopted as the opinion of the court.

The judgment of the circuit court is accordingly affirmed.

Allen, P. J., Becker and Daues, J. J., concur.

Daues, J., in the result only.

July 11, 1924.

Not to be officially published.

[File endorsement omitted.]

[fol. 146] IN ST. LOUIS COURT OF APPEALS

[Title omitted]

APPELLANT'S MOTION FOR REHEARING—Filed June 14, 1924

Now comes appellant and moves the Court to grant it a rehearing in said cause for the following reasons:

I

Because a question decisive of the case, duly submitted by counsel, has been overlooked by the Court and not passed upon in the opinion filed in the cause, to-wit: a question as to the legal effect of the defense set up and pleaded in defendant's answer in said cause.

II

Because the decision of the Court is in conflict with a decision of one of the other Courts of Appeal of the State, to-wit, the case of Shannon v. Hines, decided by the Springfield Court of Appeals and found in Vol. 205 Mo. App. p. 629.

III

Because the decision of the Court is opposed to the following authorities cited by appellant in its brief, to-wit:

24 Stat. L. 379, as amended by 34 Stat. L. 584 and 41 Stat. L. 483;
Boston & Maine R. R. v. Hooker, 233 U. S. 97;
Railway Co. v. Rankin, 241 U. S. 319;
Express Company v. Levee, 44 Sup. Ct. Rep. 11;
Railroad Co. v. Sawmill Co., 251 S. W. 434;
Railroad Co. v. Maxwell, 237 U. S. 94.

[fol. 147] IV

Because the opinion of the Court is opposed to the following cases duly cited by appellant in its brief, but which apparently were overlooked and not considered by the Court:

Railroad v. Hooker, 233 U. S. 97;
Hines v. Burnett, 107 S. E. 657;
Express Co. v. Lindenburg, 260 U. S. 584;
Express Co. v. Croninger, 226 U. S. 491;
Railway Co. v. Cark, 227 U. S. 652;
Express Co. v. Levee, 44 Sup. Ct. Rep. 11.

V

Because the provisions of the Act of Congress known as the "Transportation Act of 1920" cited by appellant in its brief, expressly pro-

vided that all rates, regulations and practices in effect on February 29, 1920 on the lines of carriers in the United States (including appellant) should continue in force until changed by state or federal authority; there had been no change made in said regulations and the same were, therefore, in force and constituted a complete defense in this cause, but the Court in its opinion denied to appellant the rights to which it was entitled under said Act of Congress.

VI

Because there was in question in the trial of this cause, the validity of an authority exercised under a Statute of the United States, to-wit, the Transportation Act of 1920, and the decision of this Court in this case denies to appellant the right, privilege or immunity especially set up and claimed by it in such statute and authority of Congress.

VII

Because, in holding and deciding that the judgment of the trial Court should be affirmed this Court has decided this case upon a different theory from that upon which respondent brought and tried the case.

In her petition, respondent proceeded upon the theory of a breach of contract by appellant for the transportation of her baggage. She [fols. 148-150] averred that, for a certain "consideration" appellant "agreed and promised well and safely and without delay, to carry said baggage" etc. and that "in violation of said agreement" appellant failed etc. These are averments of a breach of contract. This Court holds appellant liable as for an action in tort and in so holding the decision of this Court is in conflict with, and fails to follow, the last controlling decisions of the Supreme Court of this State as announced in the following cases:

Fulwider v. Power Co., 216 Mo. 582, l. c. 598;
Walker v. Railroad, 193 Mo. 453, l. c. 483;
Keele v. Railroad, 258 Mo. 62, l. c. 75;
Brunswick v. Insurance Co. 278 Mo. 154, l. c. 162.

James F. Green, M. N. Hayden, Attorneys for Appellant.

Received copy of this motion for rehearing this 14th day of June, 1924.

Thomas Bond, Attorney for Respondent.

[File endorsement omitted.]

[fol. 151] [Title omitted]

[fol. 152] SUGGESTIONS IN SUPPORT OF MOTION FOR REHEARING

We respectfully submit that in its decision in the above case the Court has fallen into a fundamental error in ignoring the plead-

ings in the case and the theory on which the case was tried. It is elemental that a plaintiff must recover on the cause of action embodied in his petition and not otherwise. Plaintiff cannot, therefore, sue upon a contract and recover in tort on the theory of a conversion. In the opinion filed in this cause the Court says:

"The conversion prevents defendant from invoking the provisions of the contract of shipment or tariff provisions limiting its liability. Upon a conversion the law creates a new relation between the parties in that the carrier is deemed to have abandoned the contract of shipment. Because of the tort the carrier cannot insist upon a stipulation that his liability was to be limited to a certain sum."

The case cited in support of this statement (Savings Bank vs. Railroad, 192 Mo. App., 616), was not a suit upon a contract but an action in trover as for the conversion of a freight shipment. It should have no bearing therefore, in this case because the theory as to recovery is entirely different. Neither is the case of Marshall Grain Company vs Railway, 176 Mo., 480 authority in point in the case at bar. The Marshall Grain case was also a suit involving a freight shipment, in which there was a consideration paid for the transportation of the property.

In the case at bar plaintiff sues as a passenger and alleges that in consideration of the fare paid by her for the transportation of herself "defendant agreed and promised well and safely and without [fol. 153] delay, to carry said baggage from Jefferson City, Mo. to Sedalia, Missouri, as aforesaid, and at the latter place to deliver same to plaintiff in as good condition as when received by defendant." The liability of the carrier, therefore, arises under the law and tariff regulations applicable to the carriage of baggage as an incident to the transportation of the owner of the baggage.

Defendant in its answer set up and pleaded various tariff regulations which were duly authorized by the law, as a reason why plaintiff was not entitled to recover the full value of her baggage.

Plaintiff in her reply did not plead that the various defenses set up by defendant were invalid or inapplicable, but simply stated that she "denies each and every allegation therein made or contained."

The case then stood as an action by plaintiff on the alleged promise and agreement of defendant to carry her baggage and the defenses set up in defendant's answer were either good defenses to the cause of action pleaded, or were invalid. No question of conversion was raised either by the pleadings or in the evidence in the case and it is elemental law, that plaintiff must recover upon the cause of action sued upon or not at all. The Court, therefore, erred in ignoring the defenses tendered by defendant and deciding the case upon a question not raised in the pleadings when tried out in the Court below.

We insist also, that the decision in this case is in direct conflict as to the measure of plaintiff's recovery with the decision of the Springfield Court of Appeals in the case of

Shannon v. Hines, 205 Mo. App., 629.

In that case plaintiff alleged that he had delivered to the carrier a certain trunk and its contents to be transported as his personal [fol. 154] baggage and that defendant failed to transport or deliver the same to him, but on the contrary "delivered same to some person at Joplin whereby plaintiff lost his trunk and contents." There was testimony in the case, that intoxicating liquors constituted part of the contents of the trunk but as to the measure of plaintiff's recovery the Court, l. c., 639, said:

"As to the amount and measure of damages the trial court is in error. It is provided in defendant's tariff on file with the Interstate Commerce Commission, which became a part of the baggage contract, that defendant would not be liable in excess of $100.00, which amount became the agreed valuation of the baggage checked unless a larger valuation was declared and paid for by the passenger. It was solely under this contract that defendant came into the possession of the trunk and contents and incurred any liability therefor.

* * * * * * *

"Plaintiff's agreement as to value and the amount of liability in case of loss, by which he induced defendant to accept his trunk and whereby any liability whatever attached, remained in force notwithstanding plaintiff's wrong may have changed the degree of care or other incidents of defendant's liability.

* * * * * * *

"This error may be corrected in this court by remitting the sum of $75.95, reducing the amount of the judgment to $100.00. If plaintiff will file such remittitur in this court within ten days the judgment will be affirmed in that amount, otherwise it will be reversed and remanded."

In the case now before the Court there is no evidence whatever of any wilful or wrongful act on part of the carrier, on the contrary, the stipulation of facts (Abs. p. 13) shows that one Clark, an outsider, without the knowledge of defendant's agents, removed the baggage check which had been attached to the trunk and substituted in lieu thereof another check; that Clark, the party so removing the check, had a duplicate of the one which he attached to plaintiff's trunk and that later on, on the presentation of this duplicate, this trunk was delivered to a party who apparently had the right to the possession of the same. There is no charge in the petition [fol. 155] nor any proof of any negligence on part of defendant's employes, in connection with this matter of delivery. When and under what circumstances Clark obtained possession of an apparently valid check is not shown and the facts in evidence simply disclose an innocent mistake on part of defendant's employes in making delivery of the trunk to a party who apparently had the legal right to the possession of same.

The Abstract of the Record in this case (p. 33) shows, that without objection the contract which was the basis of plaintiff's right to sue was offered in evidence. That contract was a baggage check reading as follows:

"Missouri Pacific Railroad Company transported subject to tariff regulations.

W. H. Bissland, General Agent, St. Louis, Mo.

Passenger's duplicate.
From Jefferson City, Mo., to Sedalia, Mo.
Routed via Mo. Pac. R. R.
Mo. Pac. R. R. Co. S-567-000."

Under a similar document the Springfield Court of Appeals said in the Shannon case:

"It was solely under this contract that defendant came into the possession of the trunk and contents and incurred any liability therefor."

[fol. 156] This case was tried by appellant upon the theory—and evidence was offered to support that theory—that, at the time involved in this case, there was no difference with respect to appellant's liability as a carrier of baggage between baggage transported in interstate commerce and that transported in intrastate commerce. In that situation, the tariffs, rates and regulations on file with the Interstate Commerce Commission and those on file with, and authorized by, the Public Service Commission of Missouri, could not be evaded by respondent, even if she had brought her suit in trover as for a conversion.

We cited in our original brief the decision of the United States Supreme Court in American Railway Express Co. vs. Levee, 44 Sup. Ct., 11; 263 U. S., 19. That case involved the question of the limitation of liability by an Express Company. The suit was brought to recover the actual value of a trunk and its contents. The express receipt contained a provision limiting the Express Company's liability. The State Court held that the plaintiff was entitled to recover the full value because of a statute of the State of Louisiana which imposed upon the defendant the burden of proving that the loss and damage had been occasioned by accidental and uncontrollable events. The Supreme Court of the United States issued its writ of certiorari and, upon a hearing in that Court, reversed the judgment of the State Court, saying:

"Coming to the merits, the limitation of liability was valid whatever may be the law of the State in cases within its control (authorities cited). The effect of the stipulation could not have been escaped by suing in trover and laying the failure to deliver as a conversion if that had been done. (Case cited.) No more can it be escaped by a state law or decision that a failure to deliver shall establish a conversion unless explained. The law of the United States

cannot be evaded by the forms of local practice. (Case cited.) Under the law of the United States governing interstate commerce the stipulation constituted a defense to liability beyond fifty dollars, [fol. 157] unless the plaintiff should prove some facts that took the case out of the protection of the contract. It had that scope in whatever Court it came up. The local rule applied as to the burden of proof narrowed the protection that the defendant had secured, and therefore contravened the law."

Under the authority of the case just cited, respondent could not have recovered the full value of her trunk and contents, if she had sued in trover and if the shipment had been interstate. The evidence offered by appellant and excluded by the Court, established that appellant had been given the same rights by the Public Service Commission of Missouri with respect to limiting its liability in the event of loss of baggage, that it had been given by the Interstate Commerce Commission. Manifestly, if respondent could not have evaded or escaped this situation by actually suing in trover and alleging a conversion by appellant of her baggage, then this Court may not permit her to do so by construing the case as one of conversion when such a case was neither pleaded nor proved.

Again, the facts with reference to the loss of respondent's baggage, does not establish a conversion.

In order to establish a conversion, the evidence must show some action by appellant tantamount to an assertion of right or dominion over the property. That action must consist of misfeasance, not merely nonfeasance. There must be evidence of an intention to assert dominion over property and to divert it from respondent's use and to deprive her of its use. The most that can be said of appellant's conduct in delivering respondent's trunk to Clark is that it was negligence but negligence is not alone sufficient to constitute a conversion.

In Colley vs. Railway Co., 187 N. W., 98 (Supreme Court of Nebraska) the plaintiff sued for loss of goods, claiming that the Railway Company had converted the property. Judgment was [fol. 158] rendered for the plaintiff on the theory that the Railway Company, in negligently losing track of the goods and being unable to deliver them, had converted them. That judgment was reversed with a holding that negligence and loss of goods was not a sufficient affirmative misappropriation of the goods or exercise of claim or control over them by the Railway Company as would constitute a conversion. The Court further held that recovery against the Railway Company on the cause of action alleged in the petition (viz., that of conversion) should be limited to the damages actually sustained through the delay and temporary loss in shipment.

In Railroad Co. vs. Nut Co., 101 N. E., 114 (Indiana) suit was brought to recover the value of a carload of pig iron. The important question in the case was whether the evidence justified the finding that the Railroad Company converted the iron in question. In answering this question in the negative, the Court said:

"A conversion by a common carrier or other bailee implies some wrongful act—a wrongful disposition or withholding of the property. There must be an affirmative wrongful act; and mere nonfeasance or failure to perform a duty imposed by contract or implied by law is not a conversion. There must be a wrongful taking or detention, or an illegal use, misuse or assumption of ownership."

In the case of Sands vs. Express Co., 193 N. W., 721 (Supreme Court of Minnesota) the plaintiff sued to recover for the loss of three trunks which it delivered to the defendant at Detroit, Minnesota, for shipment to Sauk Rapids, Minn., and recovered a verdict for the value of the goods. The delivery to the Railroad Company was made on June 8, 1920, but the goods did not reach the point of destination. The defendant contended that a greater recovery than the released value of $250.00 could not be had.

The evidence tended to establish that, when the trunks did not reach Sauk Rapids, the plaintiff notified the Express Company, sug-[fol. 159] gesting some lines of inquiry. Finally, in April, 1921, the plaintiff commenced suit and, while the action was pending, it was discovered that the trunks had been sent to Grand Rapids, Minn., where they remained until finally sent to the Twin Cities as unclaimed express and were finally sold, the defendant taking the proceeds. It furthermore appeared that there were in the trunks letters which would have shown the name of the owner and that Sauk Rapids was the destination. Under these facts, the Court first decided that there was an actual conversion by the defendant, which rendered it liable irrespective of the construction to be placed upon the Cummins Amendment. A rehearing was granted and a further opinion filed in which the former decision was adhered to.

The case again reached the Supreme Court of Minnesota and is reported in 198 N. W. 402 and, in the last hearing, the Court reached the opposite conclusion and directed that a judgment be entered in favor of the plaintiff for the declared value, notwithstanding the verdict returned. On the second hearing, the Court said:

"(1) 1. At the first hearing on the former appeal it was held that there was an actual conversion. The effect of the failure on the part of the shipper to sign the shipping receipt was left undecided. A reargument was granted. We then held that under the Cummins Amendment of August 9, 1916, 39 Stat. 441, c. 301 (U. S. Comp. St. 8860-4a), the express receipt was binding upon the shipper, though he did not sign it, following American Railway Exp. Co. v. Lindenburg, 260 U. S. 584, 43 Sup. Ct. 206, 67 L. Ed. 414. We adhered to the holding that there was an actual conversion which rendered the express company liable irrespective of the declaration of value.

* * * * * * *

The question involved is one of federal law. If the view of the Supreme Court of the United States is contrary to the view reached

upon a former hearing, our duty is to follow its guide, interpreting its decisions in the light of its later holdings, though in doing so we do not abide by the rule of practice embodied in the phrase 'the law of the case,' and though we reach a different result from that reached [fol. 160] on a former appeal. We consider anew the question of conversion.

(2) 2. In the opinion on the reargument a discussion was had of most of the pertinent cases. We felt then, as we feel now, that there may be what we then termed a conscious conversion, illustrations of which were put, that would place the carrier in such position that it could not insist upon the declared value as the measure of recovery. Further consideration leads us to the conclusion that this is not such a case and that our prior holding in this respect was wrong. There was negligence of the company. It should not have made the mistake that it did. The conversion, however, was not intended for its own advantage, nor was it in fact so. It was a conversion not more blamable than when the employees of a railway take for their own use property in the custody of the carrier for carriage. In such cases it is generally held, as noted on the former appeal, that the company is not liable beyond the terms of the receipt. It is the policy of the Cummins Amendment to put an end to litigation over the value of property lost in carriage."

* * * * * * *

"Since our former decision, American Railway Express Co. v. Levee, 44 Sup. Ct. 11, 68 L. Ed. —, has been decided. That case does not foreclose argument here. In connection with the cases which it cites, some of which along with others are cited on the rehearing in the former case, it seems to us to indicate the federal view. As we interpret it the shipper, under the facts disclosed, is not liable as for an actual conversion. The decision before reached is overruled, the judgment from which the appeal is taken is reversed, and judgment is directed in favor of the plaintiff for the declared value with interest notwithstanding the verdict returned."

In view of all of these authorities, we respectfully submit that this case is not one to which the doctrine of conversion can be applied either by the respondent, if she had sued in trover, or by this Court in so construing her suit.

The cases decided by our Supreme Court and cited under the last ground of the motion for rehearing, abundantly establish that the case heard on appeal must be the case tried below and that a case may not be decided by the Appellate Court upon a different theory from that upon which it was tried and we therefore respectfully submit that, in deciding that appellant is liable as for a conversion of [fols. 161-163] respondent's trunk, this Court has decided the case upon a different theory from that upon which it was brought and tried and that its decision is in conflict with those decisions of our Supreme Court, for which reason a rehearing should be granted and

that upon further consideration, either the judgment should be reversed and the cause remanded for another trial with a holding that the evidence offered was competent and should have been admitted, or that the judgment should be reversed and remanded with directions to the Trial Court to enter judgment in favor of respondent for One Hundred Dollars ($100.00).

James F. Green, M. U. Hayden, Attorneys for Appellant.

Received copy of the within suggestions in support of Appellant's motion for rehearing this 17th day of June, 1924.

Thomas Bond, Attorney for Respondent.

[File endorsement omitted.]

[fol. 164] IN ST. LOUIS COURT OF APPEALS

[Title omitted]

RESPONDENT'S SUGGESTIONS IN OPPOSITION TO APPELLANT'S MOTION FOR A REHEARING—Filed June 19, 1924

The points raised in the motion for rehearing and discussed in appellant's suggestions in support, were all presented to this Court in the briefs and argument of this case and the authorities now relied on by appellant were cited to the Court by the appellant in its brief.

We feel that we could safely rest the case on the logic of the Court's opinion and the argument of the respondent's brief. Since, however, appellant sees fit to reiterate its argument, we will make a few brief suggestions in reply.

I

There was no departure in this Court from the theory upon which the case was tried below.

It is somewhat difficult to follow counsel in their contention that the case was determined here upon a different theory than that upon which it was tried below, and we submit that there is nothing in the [fol. 165] record on which to base that contention.

This action was brought and tried as an action in tort for the conversion of the plaintiff's trunk. As pointed out on pages 1 and 2 of respondent's brief, the petition expressly charges that defendant "wrongfully delivered said trunk and its contents to one John H. Clark," and further avers "that as a result of said wrongful act as aforesaid, said trunk was not delivered to plaintiff, etc."

The preliminary averments in the petition, stressed in the motion for rehearing, alleging that plaintiff became a passenger and paid her fare, and that thereupon defendant promised and agreed well and safely to carry her baggage, were merely the averments of the

defendant's common law duty as a common carrier. No special contract was either pleaded or offered in evidence by the plaintiff, but plaintiff rested her case solely upon the tortious conduct of the defendant in converting her trunk and delivering it to a stranger, in violation of its common law duty of safe carriage. That such a petition is founded upon tort and not upon contract, is held not only in the cases cited in the Court's opinion, but also in the case of Central of Georgia Railway Co. v. Chicago Portrait Co., 49 S. E., 727.

II

There is no conflict between the decision in this case and the de-
[fol. 166] cision of the Springfield Court of Appeals in Shannon v. Hines.

Shannon v. Hines, 205 Mo. App. 629 was an interstate shipment from Joplin, Missouri, to Wichita Falls, Texas, as to which the defendant had properly filed and produced in evidence interstate tariffs limiting liability, and the action accrued during Federal control.

Further, in the Shannon case, the trunk was rightfully delivered to a revenue officer under a proper warrant. The defendant was not guilty of a conversion in making that delivery.

Further, the suit in the Shannon case seems to have been upon contract, the plaintiff not claiming to hold the defendant to any greater responsibility than to the exercise of care as a bailee. The point that there is a distinction between liability for loss and damage due to negligence and loss due to conversion was not made nor argued in the Shannon case, and anything that the Court may have said on that subject was pure dictum.

In the case at bar, plaintiff's shipment was wholly intrastate between points in the State of Missouri, and as pointed out in respondent's brief, pages 11 to 22, the defendant wholly failed to show that there was any tariff, either state or interstate, in effect on this shipment, limiting liability. It is, therefore, apparent that the Shannon case was based upon a totally different state of facts and that there is no conflict in the decision in the two cases.

III

In addition to the reasons given in the Court's opinion for the affirmance of this judgment, we respectfully submit that the case could also be affirmed for the reason that defendant offered no competent evidence that at the time of the conversion of plaintiff's trunk, there was any interstate tariff on file limiting liability. (See
[fol. 167] pages 11 to 15 of respondent's brief.) Further, even had there been such an interstate tariff on file, this was an intrastate shipment and at the time this cause of action accrued, Federal Control had ceased and the obligation of the carrier was determined by Missouri law and Missouri tariffs and

not by any interstate tariffs on file with the Interstate Commerce Commission. (See respondent's brief, pages 15 to 18.)

Further, the tariff which the defendant claims was in effect in this case, limiting liability to $100.00, was in express violation of Section 10449 R. S. Mo. 1919 (Sec. 40 of the Missouri Public Service Commission Law) and therefore was and is absolutely void so far as intrastate shipments are effected. (See pages 18 and 19 of respondent's brief.)

Further, there being no lawful tariff limiting liability, it follows that under the express provisions of Section 10449 R. S. Mo. 1919, the defendant was liable to the plaintiff for the full value of the property lost. (See respondent's brief, pages 19 to 22.)

For the foregoing reasons, we ask that the motion for rehearing be overruled.

Respectfully submitted. Theodore Rossieur, Thomas Bond, Attorneys for Respondent.

Copy rec'd 6-19-24. James F. Green & M. U. Hayden, Attorneys for App.

[File endorsement omitted.]

[fol. 168] IN ST. LOUIS COURT OF APPEALS

[Title omitted]

ORDER MODIFYING OPINION AND OVERRULING PETITION FOR REHEARING—July 11th, 1924

It is ordered by the Court that the opinion filed in this cause on the 6th day of June, 1924, be and is hereby modified as follows, to-wit: By striking out the word "this" in line 4 of last paragraph on page 5, and inserting in lieu thereof the word "the"; also by striking out the words "tariffs and regulations on file," lines 4 and 5 of last paragraph on page 5, and inserting in lieu thereof the words "shipping contract." The comma following the word "value," line 6 of the last paragraph on page 5 was stricken out. Page six was rewritten and attached to opinion in lieu and place of page 6 of the original opinion.

Now at this day the Court having fully considered appellant's motion for a rehearing heretofore filed herein, doth order that said motion be and is hereby overruled.

[fols. 169 & 170] IN ST. LOUIS COURT OF APPEALS

ORDER RE OPINION

Friday, July 11th, 1924.

It is ordered by the Court that the opinion in the following case be not officially reported and published: 18481, Boone v. Missouri Pacific Railroad Company.

IN ST. LOUIS COURT OF APPEALS

CLERK'S CERTIFICATE

I, Adolph Troll, Clerk of the St. Louis Court of Appeals, do hereby certify that the above and foregoing is a full, true and complete record of the proceedings in the within entitled cause as fully as the same remain on file and of record in my office and in my legal custody.

In testimony whereof I have hereunto set my hand and affixed the seal of said Court, at office in the City of St. Louis, this 10th day of November, 1924.

Adolph Troll, Clerk St. Louis Court of Appeals. (Seal of St. Louis Court of Appeals, Mo.)

[fol. 171] IN SUPREME COURT OF MISSOURI

STATE OF MISSOURI, at the Relation of MISSOURI PACIFIC RAILROAD COMPANY (a Corporation), Relator,

vs.

Honorable WILLIAM H. ALLEN, Honorable WILLIAM DEE BECKER, and Honorable Charles H. Daues, Judges of the St. Louis Court of Appeals, Respondents

NOTICE OF APPLICATION FOR WRIT OF CERTIORARI

To the Honorable William H. Allen, William Dee Becker, and Charles H. Daues, Judges of the St. Louis Court of Appeals:

The undersigned, Missouri Pacific Railroad Company, hereby respectfully gives notice that on the 29th day of July, 1924, at the opening of court on that day, or as soon thereafter as counsel may be heard, it will present to the Supreme Court of Missouri an application for a writ of certiorari, a true copy of which, together with a true copy of the original opinion of the St. Louis Court of Appeals, as modified on rehearing; a true copy of the order of said court overruling the motion for rehearing and a copy of the sug-

[fol. 172] gestions in support of application for said writ of certiorari are hereto attached, of all of which you will please take notice.

Missouri Pacific Railroad Company, by Edward J. White, James F. Green, M. U. Hayden, Its Attorneys.

St. Louis, Mo., July 22nd, 1924.

We hereby acknowledge receipt on this 22nd day of July, 1924, of copy of the foregoing notice as well as of copies of all documents described therein and attached thereto.

Wm. H. Allen, Presiding Judge of the St. Louis Court of Appeals; Wm. Dee Becker, Judge of the St. Louis Court of Appeals; Chas. H. Daues, Judge of the St. Louis Court of Appeals, Respondents. Thomas Bond, Attorney for Respondents.

[fol. 173] IN SUPREME COURT OF MISSOURI

[Title omitted]

PETITION FOR WRIT OF CERTIORARI—Filed July 23, 1924

To the Honorable Judges of the Supreme Court of Missouri:

Your petitioner, the relator herein, respectfully shows that, at all times herein mentioned, respondents were the duly elected, qualified and acting Judges of the St. Louis Court of Appeals; that relator is the defendant in a certain cause instituted and tried in the Circuit Court, City of St. Louis, Missouri, wherein Byrd J. Boone is plaintiff and relator is defendant, in which suit judgment was rendered by said Circuit Court in favor of the plaintiff and against the defendant for the sum of one thousand, sixty and no/100 dollars ($1,060.00), from which judgment your petitioner duly prosecuted an appeal to the St. Louis Court of Appeals.

Your petitioner further respectfully shows that respondents, as Judges of said St. Louis Court of Appeals, heard and determined the appeal in said cause and on the 6th day of June, 1924, entered judgment in said cause affirming the judgment of said Circuit Court and, in doing so, handed down an opinion therein, a certified copy of which opinion, as later modified by respondents at the time of the overruling of relator's motion for rehearing, is hereto attached and marked "Exhibit A."

[fol. 174] Your petitioner further shows that, within the time provided therefor by the rules of said St. Louis Court of Appeals, it filed in said Court of Appeals its motion for a rehearing and suggestions in support thereof, a true copy of which motion for rehearing is hereto attached and marked "Exhibit B."

Your petitioner further shows that thereafter, on the 11th day of July, 1924, respondents entered an order overruling said motion for rehearing, a certified copy of which order is hereto attached and marked "Exhibit C." And on said last-mentioned date respondent-

modified their said opinion (Exhibit A) in the respects indicated in said opinion as printed herein.

Your petitioner further shows that plaintiff brought this suit to recover the value of certain baggage which was transported by your petitioner from Jefferson City, Missouri, to Sedalia, Missouri; that in her petition, a true copy of the material portions of which is hereto attached and marked "Exhibit D," plaintiff averred that, in consideration of her becoming a passenger on your petitioner's railroad and paying the lawful and customary fare, your petitioner agreed and promised well and safely and without delay to carry said baggage and to deliver same to plaintiff in as good condition as when received by it, but that, in violation of said agreement, your petitioner failed to deliver said baggage; that in its answer your petitioner averred (a) that, by reason of certain tariffs theretofore filed by it with the Interstate Commerce Commission at Washington, D. C., the limit of its liability was $100.00; (b) that said tariffs, prior to the passage of the Act of Congress known as the Transportation Act, 1920, said tariffs governed the transportation of baggage over your petitioner's line of railroad within the State of Missouri; (c) that by the provisions of the Act of Congress known as the Transportation Act, in effect March 1, 1920, said tariffs remained in full force, governing the transportation of baggage by your petitioner between points within the State of Missouri until changed by state or federal authority; (d) that between said 1st day of March, 1920, and the date on which plaintiff's baggage was transported, said tariffs had not only not been changed by either state or federal authority, but that your petitioner, by order of the Public Service Commission of Missouri, had been authorized to continue said tariffs in force and applicable to the transportation of baggage over its line of railroad between points in Missouri, and that [fol. 175] said tariffs were in force at the time when plaintiff's baggage was transported, and that your petitioner was precluded by statute of this state from charging a less rate for any service performed by it in transporting either persons or property than that authorized by said Public Service Commission of Missouri, for which reason its liability to plaintiff could not exceed the sum of one hundred dollars ($100.00).

Your petitioner further shows that, upon the trial of this case, it offered evidence tending to support the allegations of its answer, but that all of the evidence so offered, excepting the check issued by your petitioner to plaintiff calling for the transportation of said baggage, was excluded upon objection of the plaintiff, and that the check so issued provided that said baggage was to be transported subject to tariff regulations.

Your petitioner further shows that it was stipulated between the parties that said baggage was transported by your petitioner from Jefferson City to Sedalia, Missouri; that after the arrival at the latter point one Clark, without the knowledge of your petitioner, in some way substituted for the check which had been placed by your petitioner upon said baggage at Jefferson City another check, duplicate of which said Clark held, by means whereof said Clark obtained possession of said baggage.

Your petitioner further shows that there were presented to respondents, as Judges of said St. Louis Court of Appeals, the following issues:

1. Whether the trial court erred in excluding, upon objection of plaintiff, the evidence offered by your petitioner in support of the allegations of its answer. Respondents decided this issue against your petitioner and affirmed the judgment of the trial court holding that upon the mere showing of a delivery of said baggage by your petitioner to another party than the plaintiff, and without either allegation or proof of intent to convert said baggage or of negligence in delivering same to Clark, your petitioner was guilty of a conversion of said baggage and was precluded from interposing the defense of limited liability under the said tariffs. In so holding respondents decided this case upon a different theory from that upon which the suit was brought, and their decision fails to follow, and is in conflict with, the controlling decisions of this Court as announced in the following cases:

Fulwider v. Power Co., 216 Mo. 582, l. c. 598;
Walker v. Railroad Co., 193 Mo. 433, l. c. 483;
Keele v. Railroad Co., 258 Mo. 62, l. c. 75;
[fol. 176] Brunswick v. Insurance Co., 278 Mo. 54, l. c. 162;
Ingwerson v. Railroad, 205 Mo. 328, l. c. 335.

And said decision is further in conflict with the decision of the Springfield Court of Appeals in the case of

Shannon v. Hines, 205 Mo. App. 629.

2. Whether by reason of the provision of the Act of Congress known as the Transportation Act 1920, that all rates and regulations which on February 29, 1920, were in effect on the line of your petitioner's road, should continue in force and effect until thereafter changed by state or federal authority, the trial court erred in excluding the evidence offered by your petitioner tending to establish (a) that certain tariffs and rates were in force on February 29, 1920; (b) that said tariffs were not only not changed after February 29, 1920, but were authorized to be continued in force by order of the Public Service Commission of Missouri; (c) that said tariffs were in force in Missouri at the time of plaintiff's alleged loss, and (d) that said tariffs by express provision limited your petitioner's liability to plaintiff to the sum of one hundred dollars in view of plaintiff's admission that she did not declare any greater value of said baggage at the time she delivered same for transportation, and did not pay or offer to pay any excess charges therefor.

Respondents decided that the ruling of the trial court in excluding such evidence was correct and, in so holding, their decision denies to your petitioner the right, privilege and immunity to which it was and is entitled under said act of Congress, and is in conflict with the law as announced by the Supreme Court of the United States in the following cases:

Railroad v. Hooker, 233 U. S. 97;
Express Co. v. Lindenburg, 260 U. S. 584;

Express Co. v. Croninger, 226 U. S. 491;
Railway Co. v. Carl, 227 U. S. 652;
Express Co. v. Levee, 44 Sup. Ct. Rep. 11;
Telegraph Co. v. Czizek, 44 Sup. Ct. Rep. 328;
Railway Co. v. U. S., 234 U. S. 342.

Your petitioner further respectfully shows that in so deciding this case respondents have refused to follow said last previous rulings of this Court, as required by the constitutional mandate of this state, for which reason it is the duty of this Court, in accordance with the pro-
[fol. 177] visions of the Constitution of this state, to exercise its superintending control over said St. Louis Court of Appeals by the issuance of its writ of certiorari, to the end that the erroneous judgment and opinion of said St. Louis Court of Appeals so delivered, as aforesaid, may be quashed and annulled.

Your petitioner further shows to this Court that it has been prejudiced by said erroneous judgment of said St. Louis Court of Appeals, and that unless said erroneous judgment is quashed and annulled by this Court it will be compelled to pay, under the mandate which will be issued by said St. Louis Court of Appeals, in accordance with its said judgment the sum of one thousand and sixty dollars ($1,060.00), with interest and costs, whereas, if said Court of Appeals had followed said controlling decisions of this Court your petitioner would have had the benefit of the judgment of said St. Louis Court of Appeals reversing the judgment of said Circuit Court.

Your petitioner further shows that it is remediless against said erroneous judgment and cannot be relieved therefrom by the ordinary proceedings and processes of law.

Your petitioner herewith presents for the consideration of this Court the attached suggestions in support of this application.

Wherefore, your petitioner prays this Honorable Court for the issuance of the state's writ of certiorari, addressed to respondents, commanding them, and each of them, to certify to this Honorable Court the record filed and made in said court in said case and to recall the mandate of said Court of Appeals, if same has been issued, and that upon final hearing and an examination of said record, this Honorable Court order and adjudge that said judgment rendered by said Court of Appeals be quashed and annulled and ordered for naught held and esteemed.

Missouri Pacific Railroad Company, Relator, by Edward J. White, James F. Green, M. N. Hayden, Its Attorneys.

[fol. 178] Jurat showing the foregoing was duly sworn to by M. U. Hayden, omitted in printing.

[fol. 179] SUGGESTIONS IN SUPPORT OF PETITION FOR WRIT OF CERTIORARI

The plaintiff brought this suit upon the theory that your petitioner entered into a contract with her for the transportation of her baggage, which contract was breached by your petitioner. Her petition averred:

"That in consideration of plaintiff becoming a passenger on said railroad and paying the lawful and customary fare * * * defendant agreed and promised, well and safely and without delay, to carry said baggage, etc. And that in violation of said agreement and in total disregard of its duty as a common carrier defendant failed and neglected to deliver said baggage."

We submit that this petition avers the existence of a contract of carriage between the parties and a breach of said contract by the defendant. Nowhere in the petition is there an allegation of any facts constituting a conversion by your petitioner of the plaintiff's baggage or of any intention on its part to convert the same, or of any neglect in permitting another to obtain possession of same.

This baggage was not appropriated by the defendant to its own use. If there was a conversion of it, such conversion was accomplished by the mere delivery of the baggage by defendant to a third party who presented a check which, on its face, entitled him to such baggage. There is no allegation and no proof of any negligence on the part of your petitioner resulting in the exchange by said third party of the original checks and the substitution of other checks. All that happened, as disclosed by the proof, is that, without the knowledge of defendant, either actual or constructive, one Clark removed from said plaintiff's baggage the check originally placed thereon at Jefferson City and substituted therefor another check, the duplicate of which Clark held, and that, after doing this, Clark's agent later appeared, presented the duplicate check which corresponded to the one on the trunk, and thereby obtained possession of it. We repeat that there is no allegation and no proof of any negligence on the part of defendant contributing either to the [fol. 180] substitution of the checks or the obtaining by Clark of the trunk by means of the substituted check. The delivery of baggage to a third party, in order to constitute a conversion, must be a wrongful delivery, and unless there was such wrongful delivery of this baggage plaintiff cannot recover upon the theory of a conversion.

The law upon this subject may be found in Section 21, page 1111 of Volume 26 of Ruling Case Law, where the rule is thus stated:

"As a logical deduction from this doctrine, it would hardly seem that the defendant, in order to be guilty of conversion, must have converted the property to his own use; and if not, then any other act, to amount to conversion, must be done with a wrongful intent, either express or implied."

It may be true that, under the authorities, if the defendant in this case had appropriated plaintiff's baggage to its own use, either by advertising it and selling it and keeping the proceeds, or otherwise, then proof of that fact, without further averment and proof, would amount to a conversion; but the alleged conversion in this case consisted in delivering the baggage to a third person who presented a check which, upon its face, entitled him to possession of it, and we submit that, before such an act can be adjudicated a conversion, there must be both averment and proof of an intention, either express or implied, on the part of defendant to convert the baggage. We submit, therefore, that, under the pleadings and proof, it cannot properly be held that defendant's act in delivering this baggage to Clark amounted to a conversion.

As said by the Supreme Court of Indiana in Railroad Co. v. Nut Co., 101 N. E., 114:

"A conversion by a common carrier or other bailee implies some wrongful act—a wrongful disposition or withholding of the property. There must be an affirmative wrongful act, and mere nonfeasance or failure to perform a duty imposed by contract or implied by law is not a conversion. There must be a wrongful taking or detention, or an illegal use, misuse or assumption of ownership."

[fol. 181] However, this case was not brought upon the theory of conversion and plaintiff did not so plead her case in her petition. Nevertheless, the St. Louis Court of Appeals based its decision affirming the judgment of the trial court solely upon the reasoning that defendant, by merely delivering the baggage to Clark, was guilty of a conversion which created a new relation between the parties "in that the carrier is deemed to have abandoned the contract of shipment." Such was not the theory upon which the case was brought or tried.

In a long line of decisions this Court has held that a case must be decided upon appeal upon the same theory upon which it was brought and tried.

In Ingwerson v. Railroad, 205 Mo., 328, l. c., 335, quoting from and referring to prior decisions, this Court said:

"Nor can plaintiff sue upon one cause of action and recover upon another (authorities cited). A recovery, if at all, must be on the contract set forth in the petition. So, when the petition is based on a parol contract a written agreement undertaking to vary or modify the verbal contract will not be admitted in evidence. In other words, parties must stand or fall upon their pleading, and will not be permitted at the trial by evidence to blend the two and graft the verbal on the written contract."

In that case the Court further said:

"A variance between the duty or contract as stated and the proof adduced in support thereof may be fatal to a recovery; for, whether the action is in form ex contractu or ex delicto, if the cause of action,

as set forth, originates in a contract the contract must be proved as laid."

In the cases cited in this petition this Court has enforced the rule "which requires the appellant to try his case in the appellate forum on the same theory upon which he tried it below" and has frequently said " it is a clear principle of law that a trial theory abides for appellate purposes."

[fol. 182] Not only has this Court held that the parties may not present their case on appeal upon a different theory from that upon which it was tried, but it has further held that the Appellate Court may not assist the parties by deciding the case upon a different theory from that upon which it was tried.

As said by Judge Graves in delivering the opinion of this Court in De Gonia v. Railroad, 224 Mo., 564, l. c., 588:

"We have uniformly held that where a case is tried nisi, upon a certain theory, that it must be heard and tried here upon that theory. We have held the bar of the State in all strictness to that rule. * * * Having held the bar in strictness to the rule, shall we ourselves violate it by saying, although the case was never tried and submitted on a proper theory of the law, yet we think there is a good case on the facts and we will affirm the judgment, although the jury has never been permitted to pass upon the facts when coupled with proper declarations of law? * * * The rule which we, with strictness, apply to the bar, with the same strictness we should apply to ourselves."

We submit that in holding that defendant is liable as for a conversion of plaintiff's baggage the Court of Appeals has decided the case upon a wholly different theory from that upon which it was brought and that its decision conflicts with the rules heretofore announced by this Court and herein referred to.

Although, strictly speaking, it may not be a reason for the issuance of this Court's writ of certiorari, we nevertheless deem it not improper to direct attention to the fact that the effect of the decision of the St Louis Court of Appeals is to put into operation a clear discrimination between baggage transported in interstate commerce and that transported in intrastate commerce. In the concluding paragraph of the opinion it is, in effect, conceded that the law is that, with respect to an interstate transportation of baggage the plaintiff cannot sue in trover as for conversion and recover the full amount, whereas, in the case of baggage transported in intrastate commerce the rule is different. If that is the law then in delivering plaintiff's baggage to the wrong party in this case defendant was guilty of a [fol. 183] conversion which precludes it from insisting upon its limited liability, whereas, if plaintiff had checked the trunk to a point outside the State of Missouri and the same disposition of it had been made defendant could not have been held for the full liability upon the theory of a conversion. This rule conflicts with the law as laid down by the Supreme Court of the United States in

the Shreveport case—Railway Co. v. U. S., 234 U. S., 342, as well as the rules laid down by that Court in the other cases cited in the petition.

Respondents' opinion concedes that the answer in this case "sets up all averments sufficient to bring it within the provisions of the tariff rates and regulations on file with the Interstate Commerce Commission and the Public Service Commission of Missouri."

Defendant offered evidence tending to establish those averments, but all of its evidence was excluded upon objection of the plaintiff. That evidence, if admitted, when considered in the light of the provisions of the Transportation Act 1920 and the decisions of the federal courts interpreting that act, would have established the following facts, which facts, we contend, limit defendant's liability in this case:

1. That on February 29, 1920, defendant had on file tariffs providing for a limited liability under the circumstances which were established by plaintiff's own testimony in this case.

2. That those tariffs governed the transportation of intrastate as well as interstate baggage.

3. That by express provision of the Transportation Act those tariffs were continued in force from and after February 29, 1920, until after the loss of plaintiff's baggage.

4. That by order of the Public Service Commission of Missouri those tariffs were in force at the time of the loss of plaintiff's baggage, and we insist that that evidence was competent and should have been admitted, and, when admitted, will show conclusively that defendant's liability in this case cannot exceed the sum of $100.00, and that whatever may be the effect of the statute of this state, R. S. 1919, Sec. 10449, at the present time, it cannot operate, in view of the rates in force at the time involved in this suit, to increase defendant's liability beyond the sum provided by such rates.

[fol. 184] For these reasons we submit that this writ should be issued and that this case should be reviewed by this Court to the end that a decision may be had of the issues presented by the pleadings and proof and not upon a theory presented by neither.

Edward J. White, James F. Green, M. N. Hayden, Attorneys for Appellant.

[fols. 185-190] EXHIBIT A—Omitted; printed side page 139 ante.

[fols. 191-194] EXHIBIT B—Omitted; printed side page 146 ante.

[fols 195 & 196] EXHIBIT C—Omitted; printed side page 168 ante.

[fol. 197] EXHIBIT D

Plaintiff's Second Amended Petition

(Omitting caption)

Plaintiff comes by her attorney, and by leave of Court files this her second amended petition, and for cause of action states that at all the times hereinafter mentioned defendant was and is a corporation duly organized and incorporated under the laws of the State of Missouri, relating to the formation of railroad companies, and having its principal office and agents for the transaction of its usual and customary business in the City of St. Louis, State of Missouri; that at all of said times defendant owned and operated a line of railroad extending from the city of Jefferson City, in the State of Missouri, to the City of Sedalia, in the State of Missouri, and that defendant was and is a common carrier for hire of goods, passengers and baggage between said points, and that said railroad, owned and operated by defendant as aforesaid, runs into and through the City of St. Louis, Missouri.

Plaintiff further states that on, to wit, the 3rd day of January, 1922, she became and was a passenger for hire on the defendant's said railroad from Jefferson City, Missouri, to Sedalia, Missouri, and as a passenger thereof delivered to defendant, at Jefferson City, Missouri, in good and proper condition, her baggage, consisting of one trunk containing wearing apparel and other articles of personal convenience; that in consideration of plaintiff becoming a passenger on said railroad, and paying the lawful and customary fare, which [fols. 198 & 199] said fare plaintiff duly paid to defendant, defendant agreed and promised, well and safely and without delay, to carry said baggage from Jefferson City, Missouri, to Sedalia, Missouri, as aforesaid, and at the latter place to deliver same to plaintiff in as good condition as when received by defendant.

Plaintiff further states that defendant, in violation of said agreement, and in total disregard of its duty as a common carrier, as aforesaid, failed and neglected to deliver said baggage at its destination to plaintiff, or to anyone for her, in as good condition as when received by it, but, in disregard of its duty as aforesaid, wrongfully delivered said trunk and its contents to one John H. Clark, and that as a result of said wrongful act aforesaid, said trunk was not delivered to plaintiff for more than one month thereafter, and in a broken and damaged condition and with the following articles of wearing apparel missing therefrom, to wit:

[fol. 200] IN SUPREME COURT OF MISSOURI

[Title omitted]

ORDER DENYING PETITION FOR REHEARING

Now at this day, on consideration of the petition for a writ of certiorari herein to the said Judges of the St. Louis Court of Appeals, it is ordered by the Court that the said petition be, and the same is hereby, denied.

STATE OF MISSOURI, set:

IN SUPREME COURT OF MISSOURI

CLERK'S CERTIFICATE

I, J. D. Allen, Clerk of the Supreme Court of the State of Missouri, certify that the foregoing is a full, true and complete transcript of the order of said Supreme Court, entered of record at the October Term thereof, 1924, and on the 8th day of October, 1924, in the above entitled cause.

Given under my hand and seal of said Court, at the City of Jefferson, this 7th day of November, 1924.

J. D. Allen, Clerk. (Seal of the Supreme Court of Missouri.)

SUPREME COURT OF THE UNITED STATES

On Petition for Writ of Certiorari to the St. Louis Court of Appeals of the State of Missouri

ORDER GRANTING PETITION FOR CERTIORARI—Filed January 5, 1925

On consideration of the petition for a writ of certiorari herein to the St. Louis Court of Appeals of the State of Missouri, and of the argument of counsel thereupon had,

It is now here ordered by this Court that the said petition be, and the same is hereby, granted, the record already on file as an exhibit to the petition to stand as a return to the writ.